TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 197.

FRANCIS L. MARKEY, ISAAC BRANCH, AND DANIEL W. BRANCH, APPELLANTS,

vs.

W. C. LANGLEY, SAMUEL KEYSER, AND C. D. COOK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED JULY 7, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 197.

FRANCIS L. MARKEY, ISAAC BRANCH, AND DANIEL W. BRANCH, APPELLANTS,

vs.

W. C. LANGLEY, SAMUEL KEYSER, AND C. D. COOK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

INDEX.

	Original.	Print.
Bill	2	1
Subpœna ad respondendum	11	12
Return and acceptance of subpœna	12	12
Answer of F. L. Markey et al	13	13
Answer of Goodrich, Wineman & Co	27	18
Answer of Harvey Cogswell	32	20
Exhibit A to answer of Harvey Cogswell	34	20
Answer of Benjamin F. Evans	37	22
Exhibit A to answer of Benjamin F. Evans	39	22
Answer of Benjamin Mordecai	55	28
Answer of "The Kalmia Mills"	57	28
Replication of W. C. Langley & Co	59	29
Cross-bill	61	30
Subpœna ad respondendum	79	36
Return and acceptance of subpœna	81	37
Answer of W. C. Langley & Co	81	37
Replication of F. L. Markey & Co	90	40
Decree of George S. Bryan, district judge, March 18, 1868	91	40
Decree of George S. Bryan, district judge, March 20, 1868	92	41
Report of James Tupper, special referee	95	42
Order confirming report of James Tupper, special referee	102	45
Order appointing C. H. Simonton special referee in place of James Tupper, deceased	104	46
Petition of W. C. Langley	105	46
Order referring petition to C. H. Simonton, special referee	109	48
Report of C. H. Simonton, March 28, 1870	111	49
Order confirming report of special referee, March 28, 1870	114	50
Receipt of Daniel Horlbeck, clerk, for bond	116	51
Order discharging lien from land	116	51

	Original.	Print.
Report of Charles H. Simonton, special referee	119	52
Exceptions of W. C. Langley & Co. to report	179	79
Exceptions of F. L. Markey & Co. to report	186	83
Decree of Hugh L. Bond, circuit judge, April 18, 1873	189	84
Report of C. H. Simonton, special referee, April 18, 1874	198	88
Final decree of Hugh L. Bond, circuit judge, April 25, 1874	204	90
Summons to G. H. Sass, assignee in bankruptcy of Harvey Cogswell & B. F. Evans, J. E. Burke, assignee of B. Mordecai, "The Kalmia Mills Company," G. C. Goodrich, P. Wineman, & J. Ashhurst to join in appeal	206	91
Notice of severance	208	92
Notice of Goodrich, Wineman & Co. that they unite in appeal	209	92
Order of severance	210	93
Order allowing appeal	211	93
Appeal-bond	212	94
Clerk's certificate	213	94
Appeal-bond	214	94

1 THE UNITED STATES OF AMERICA,
District of South Carolina, to wit:

At a circuit court of the United States for the fourth circuit in and for the district of South Carolina, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1869, before the honorable Hugh L. Bond and the honorable George S. Bryan, judges of the United States for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

W. C. LANGLEY & Co.
vs.
HARVEY COGSWELL, BENJAMIN F. EVANS, Benjamin Mordecai, The Kalmia Mills, Francis L. Markey, Isaac Branch, Daniel W. Branch, George C. Goodrich, Philip Wineman, John Ashhurst.

Be it remembered that heretofore, to wit, the first Monday in
2 April, in the year of our Lord one thousand eight hundred and sixty eight, the said W. C. Langley & Co. impleaded the said Harvey Cogswell, Benjamin F. Evans, Benjamin Mordecai, The Kalmia Mills, Francis L. Markey, Isaac Branch, Daniel W. Branch, George C. Goodrich, Philip Wineman, John Ashhurst, in a bill to enforce sale, and for injunction, as follows:

Bill.

3 UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

To the judges of the circuit court of the United States for the district of South Carolina:

William C. Langley, Samuel Keyser and Charles D. Cooke, citizens of the State of New York, copartners in trade, carrying on business in the city and State of New York under the name and style of W. C. Langley & Co., bring this their bill against Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, citizens of the State of South Carolina, "The Kalmia Mills," a body politic incorporated by and under the laws of South Carolina, and Francis L. Markey, Isaac Branch, and Daniel W. Branch, citizens of South Carolina, copartners, carrying on business in said State under the name and style of F. L. Markey & Co., and George C. Goodrich, Philip Wineman, and John Ashhurst, citizens of South Carolina, copartners, carrying on business in said State under the name and style of Goodrich, Wineman & Co.; and thereupon your orators complain and say, that the said Kalmia Mills, being a body politic and corporate under the laws of the said State of South Carolina, by deed bearing date the thirty-first day of July, A. D. 1866, under their corporate seal, did convey to your orators "all those several pieces, parcels, and tracts of land situate, lying, and being in the district of Edgefield and State aforesaid, amounting in all to four thousand two hundred and fifty-nine (4,259) acres, more or less, purchased by the said Kalmia Mills and conveyed to them by John J. Glover, by deed bearing date the ninth day of December, A. D. 1865, duly recorded in the mesne conveyance office,

Edgefield district, in book S. S. S., p. 476, and also by Gustavus Volger, by deed bearing date the twenty-eighth day of July, A. D. 1866; all of which several tracts of land were then in the possession of and occupied by the said The Kalmia Mills as the site of their factory then in course of erection, together with all and singular the waters, water privileges, rights, members, hereditamants, and appurtenances to the said premises belonging or in anywise incident or appertaining; also all the buildings, machinery, tools, implements, horses, mules, carts, bricks, lumber, and materials belonging to the said The Kalmia Mills, on the land and elsewhere," by way of mortgage to secure the payment of two promissory notes of the said Kalmia Mills to your orators, bearing date the twenty-third day of June, A. D. 1866, the one for the sum of one hundred and fifty thousand ($150,000) dollars, the other for the sum of three thousand seven hundred and fifty (3,750) dollars; each of the said notes payable on the first day of February, A. D. 1867, at the First National Bank of Charleston, with interest at the rate of seven per cent. per annum from the date thereof, the said notes being payable to the order of Benjamin F. Evans, and endorsed by the said Benjamin F. Evans, Benjamin Mordecai, and Harvey Cogswell; and it was covenated in the said deed that if default should happen to be made in payment of the said notes, *that* it should not be necessary for your orators to apply either to a court of law or equity for the purpose of foreclosing the said mortgage, but upon such default of payment of either principal or interest your orators should have full power and authority to put the mortgaged premises into the hands of some good broker and auctioneer, to be sold for cash or credit at the option and direction of your orators, at public sale, to the highest bidder according to the custom of vendue, after thirty days' advertisement of the time and place of sale in any one of the newspapers in the city of Charleston, and any one in the city of New York, your orators returning the overplus, if any should happen to be from the net proceeds of such sale, all expenses being first deducted, after paying themselves the amount due upon the said notes, to the said The Kalmia Mills; and for better enabling and empowering your orators to effect the said sale without hinderance, your orators and the survivor of them were thereby constituted and appointed the attorneys irrevocable of the said The Kalmia Mills, to execute and deliver good and sufficient titles or deeds of conveyance to the purchaser in fee-simple, with such covenants
4 of warranty as are usually inserted in conveyances in fee-simple of real estate, and to do all and every other act necessary and proper for the full effecting and performing the covenants in said deed contained. And the said The Kalmia Mills, by another deed under their corporate seal, bearing date the third day of November, A. D. 1866, did convey the said property hereinbefore described to your orators, by way of mortgage to secure the payment of two other promissory notes of the said Kalmia Mills, bearing date the tenth day of October, A. D. 1866, the one for thirty thousand (30,000) dollars, with interest at the rate of seven per cent. per annum, the other for seven hundred and fifty (750) dollars, payable on the first day of February, A. D. 1867, at the First National Bank of Charleston; the said notes being payable to the order of Benjamin F. Evans, and endorsed by the said Benjamin F. Evans, Benjamin Mordecai, and Harvey Cogswell, with a covenant and agreement in the same words as those in the preceeding deed between the same parties hereinbefore stated; which deeds were duly recorded in the mesne conveyance office, Edgefield district. And your orators further show, that default having been made by the said Kalmia Mills in payment of the said notes at the time ap-

pointed in the said mortgages for payment, your orators, the mortgagees, after the said failure and default of payment, to wit, on or about the sixteenth day of March, A. D. 1867, after due notice in writing to the said Kalmia Mills, in pursuance of the power and authority to them given in the said deeds, caused the mortgaged premises hereinbefore described to be put up for sale at public auction by Wardlaw and Carew, good brokers and auctioneers, in the city of Charleston, on the twenty-third day of April, A. D. 1807, after thirty days' advertisement of the time and place of sale in one of newspapers in the city of Charleston and one in the city of New York. And your orators further show, that the sale did take place at the time and place last aforesaid, according to the said custom of vendue, and the said premises were knocked down to the said Harvey Cogswell at and for the sum of twenty thousand dollars over and above the amount then and there due to your orators upon the said promissory notes secured by the said mortgagees, he being at that price or sum the highest bidder; the amount so due and owing to your orators being about one hundred and ninety thousand (190,000) dollars.

And your orators further show, that the said Harvey Cogswell then and there declared that the said purchase was made by him for and behalf of himself and of the said Benjamin F. Evans and Benjamin Mordecai and such other persons as should contribute to the purchase-money and come in and unite with them in the formation of a new company for the purpose of carrying on the contemplated enterprise.

And your orators further show, that in accordance with and pursuance of the said sale, and for effectuating the same, your orators did afterwards, to wit, on the tenth day of May, A. D. 1867, as the attorneys of the said The Kalmia Mills, in that behalf duly appointed as aforesaid, execute and deliver to the said Harvey Cogswell a conveyance of the entire property described in the mortgage deeds aforesaid, and sold thereunder as aforesaid, to him and his heirs and assigns forever: "In trust, nevertheless, to, for, and upon the following uses and trusts, and subject to the following powers, provisoes, and conditions that is to say, in trust, out of, and from the said purchase-money to pay first the costs and expenses of the said sale, then to pay the following promissory notes under the hands and seals of the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, bearing date the same day as these presents, given for the credit portion of the purchase-money, viz: Three notes for the sum of four thousand seven hundred and seventy-nine $\frac{02}{100}$ dollars, each payable five, six, and seven months respectively, after date, to the order of Wm. C. Langley & Co., at the First National Bank of Charleston, with interest from date at the rate of seven per cent. per annum; one note for the sum of one hundred and eighty thousand (180,000) dollars, payable on the twelfth day of January, A. D. 1868, to the order of the said Wm. C. Langley & Co., at the First National Bank of Charleston, with interest from date at the rate of seven per cent. per annum; and one note for the sum of twenty thousand (20,000) dollars, payable on the twenty-third day of April, A. D. 1868, to the order of the said William C. Langley & Co., at the same bank, with interest from date at the rate of seven per cent. per annum, as by reference to the said notes, copies of which are hereon endorsed, will more fully appear: And subject to the trusts for the payment of the entire amount of the purchase-money as aforesaid, to and for such uses and trusts, intents and purposes, and to and for such person or persons, and in such shares, estates, and proportions as they, the said Harvey Cogswell, Benjamin F. Evans and Benjamin Mordecai, shall by any deed or deeds, under their

hands and seals, executed in the presence of two credible witnesses, from time to time or at any time declare, limit, and appoint; and until and in default of such appointment for the use of the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, their heirs and assigns, forever, subject to the trusts hereinbefore declared, limited, and appointed." And the said deed of conveyance further contains a general warranty by the said Kalmia Mills to the said Harvey Cogswell, and a covenant in the words following: "And it is hereby further provided and declared that if default shall be made in payment to the said Wm. C. Langley & Co. of the said principal or interest of the said promissory notes given for the purchase-money as aforesaid, or any or either of them respectively, or any part thereof, at the times appointed for the payment of the same respectively, it shall not be necessary for the said William C. Langley & Co. or their assigns to apply either to a court of law or equity for the purpose of foreclosure or sale; but upon such default made in the payment either of the principal or interest, then it shall be lawful for the said Wm. C. Langley & Co. or their assigns, at any time or times after such default shall have been so made, without any further consent on the part of the said Harvey Cogswell or his assigns, or of the said The Kalmia Mills, or their successors or assigns, to make sale and dispose of the premises hereinbefore described and conveyed, or any part thereof, at public auction, for cash or on credit, at the option of the said Wm. C. Langley & Co. or their assigns, to the highest bidder, according to the custom of vendue, after thirty days' advertisement of the time and place of sale in any one of the newspapers in the city of Charleston, and any one in the city of New York; the said Wm. C. Langley & Co. or their assigns returning the overplus, if any should happen to be from the net proceeds of such sale, all expenses being first deducted after paying themselves the amount of their indebtedness, unto the said Harvey Cogswell, his heirs, executors, administrators, or assigns; and that for the purposes aforesaid, or any of them, it shall be lawful for the said Wm. C. Langley, Samuel Keyser, and Charles D. Cook, or the survivors or survivor and the heirs of such survivor, to make and execute or cause to be made and executed all such agreements, deeds, conveyances, and assurances as they the said William C. Langley, Samuel Keyser, and Charles D. Cook, or the survivors or survivor of them, and the heirs of such survivors or assigns, shall think fit; and it is also hereby agreed that upon any sale or sales which shall be made under the power of sale hereinbefore contained by the said William C. Langley & Co. or their assigns, or by any other person or persons who may not be seised of the legal estate in the premises to be sold, *that* the said Harvey Cogswell, the said The Kalmia Mills, or any other person or persons claiming by, through, or under them, in whom the legal estate of the same premises or any part thereof shall be vested, shall make such conveyances and assurances of the same for the purpose of carrying the sale thereof into effect as the person or pe'sons by whom the sale shall be made shall direct."

And the said deed also contained a covenant by the said Harvey Cogswell that he would keep the property so conveyed to him insured, and assign the policies to your orators; and that in case of the neglect or refusal of the said Harvey Cogswell so to insure, *that* your orators should have the right to insure and re-imburse themselves for the premium and expenses under the said deed; and the said deed lastly contained a covenant for further assurance; all of which will more fully appear by reference to the said deed, which is duly recorded in the

office of the clerk of the court and register of mesne conveyances in Edgefield district, and a copy of which is in the hands of your orator's solicitor, ready to be produced when required.

And your orators further show unto your honors, that all the promissory notes mentioned and described in the said deed of conveyance were duly executed by the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, and delivered to your orators, at the time of the execution and delivery of the said deed; but the note for twenty thousand dollars, ($20,000,) payable on the 23d day of April, A. D. 1868, being for an amount over and above the amount due on the day of sale to your orators upon the promissory notes of the said Kalmia Mills, was assigned by your orators to the said Kalmia Mills, and delivered to the said Benjamin F. Evans, president, to be held by him for the benefit of the creditors of the said Kalmia Mills other than your orators; the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai having computed that the said sum of twenty thousand dollars would cover the entire floating debt of the said Kalmia Mills over and above the debt to your orators secured by the mortgages aforesaid, and they therefore having bid that amount for the said property over and above the amount of the debt due to your orators, and having given their note for the same, and included the said note as part of the purchase-money, the payment of which was secured by the deed of conveyance to Harvey Cogswell in trust as aforesaid.

6 And your orators further show unto your honors, that, contemporaneously with the execution of the said deed of conveyance to Harvey Cogswell, your orators entered into an agreement with the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, the purchasers of the property, to the effect that inasmuch as the terms of sale upon which the mortgaged property was advertised were one-third cash, balance in six, nine, and twelve months, secured by mortgage of the property, and it had also been announced at the said sale that more accommodating terms might be had by approved purchasers; and your orators were authorized and empowered to sell for cash or on credit, at their option, and were entitled to be the first paid from the proceeds of sale; and the creditors of the said Kalmia Mills other than your orators therefore not being entitled to receive any portion of the cash, if any cash should be required, and the purchaser of the property not being able to pay the one-third cash required by the terms of sale, your orators were willing and consented, in pursuance of their power and in the exercise of their discretion, to waive their right to a payment of one-third cash, and also to the payment of the balance of the credit portion of the purchase-money to which they were entitled in six and nine months, and to extend the time for the payment of so much of the purchase-money as they were entitled to receive, leaving the twenty thousand dollars (20,000) of the purchase-money over and above their debt to be paid in twelve months from the day of sale, according to the terms as advertised, upon condition that the parties for whom the property was purchased should give to your orators collateral security in addition to the security of the property itself; which agreement was reduced to writing and signed by your orators and the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, and is in the hands of your orators' solicitor, ready to be produced to this honorable court if it shall be required.

And your orators further shew, that, in pursuance of the said agreement, the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai did, on the said tenth day of May, A. D. 1867, execute and

deliver to your orators their joint and several bond of indemnity, in the penal sum of one hundred thousand ($100,000) dollars, in which the sale and purchase and agreement aforesaid were all fully recited, and the promissory notes given for the entire purchase-money were also fully set forth; the condition of which said bond of indemnity was in these words: "Now, the condition of the above obligation is such that if the above-bound Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, their or either of their heirs, executors, administrators, or assigns, shall well and truly pay or cause to be paid to the obligees all and every such amount and amounts as shall or may remain due and payable upon the promissory notes aforesaid, given by them for the purchase-money of the said Kalmia Mills property aforesaid, or upon any of them, or upon any renewal or renewals of the same, after the property so conveyed in trust shall have been sold and the proceeds applied to the payment of the said notes, and also shall pay or cause to be paid to the said obligees all such sum and sums of money as shall or may be hereafter advanced and paid and loaned to the said obligors by the said obligees, principal and interest, and shall and will also well and truly indemnify and save harmless the said obligees from all loss or damage which they shall or may sustain by reason of the insufficiency of the proceeds of sale of the property so conveyed to the said Harvey Cogswell as aforesaid to pay the entire debt due to the said obligees, principal and interest, then this obligation to be null and void; otherwise to remain in full force and virtue."

And your orators further shew, that to secure the said bond of indemnity the said Harvey Cogswell and Benjamin F. Evans did afterwards, to wit, on the day of , A. D. 1868, execute and deliver to your orators a mortgage of certain real estate owned by them jointly in Charleston and Columbia, and certain property owned by them individually in Columbia. And the said Benjamin Mordecai did, on the day of , A. D. 1868, execute and deliver to your orators a mortgage of certain real estate owned by him in Charleston, and also of certain lands in the State of Florida, and did also assign to your orators a certain mortgage of a store and lot in Hayne street, in the city of Charleston, held by him, the said Benjamin Mordecai, in his own right; all of which will appear by reference to the originals in your orators' possession, ready to be produced if necessary, and to the record of the said mortgages in the mense conveyance office, Charleston.

And your orators further show unto your honors, that the three joint and several promissory notes, under seal of the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, for four thousand seven hundred and seventy-nine 3-100 dollars, ($4,779.03) each, dated the tenth day of May, A. D. 1867, and payable respectively five, six, and seven months after date, and also the note of the same parties for one hundred and eighty thousand dollars, ($180,000,) of the same date,
7 and payable on the twelfth day of January, A. D. 1868, are all past due, and that no one of them or any part or portion thereof, principal or interest, has been paid, but remain in your orators' possession totally unpaid.

And your orators further show unto your honors, that after the said notes fell due and remained unpaid, your orators, at the instance and request of the makers of the said notes, forbore for a considerable space of time to enforce their rights under the conveyance to Harvey Cogswell, in trust, as aforesaid, to allow the said parties to make an effort in New York to raise the money for the payment of their debt to

your orators; that the said Benjamin F. Evans and Benjamin Mordecai, having failed in their effort, on the sixth day of February, 1868, addressed the following letter to your orators:

NEW YORK, *Feb. 6th*, 1868.

Messrs. W. C. LANGLEY & Co., *New York:*

GENTLEMEN: We hereby respectfully request you to take possession of the entire property at Hampton, Edgefield District, South Carolina, known as the Kalmia Mills, and now mortgaged to you by Harvey Cogswell, trustee for himself and others, and that you will advertise the property according to the terms of the mortgage, and sell the same at such time and place as you may see proper to do, and as will be for the advantage of all concerned.

We also desire that you will take possession of all the other property mortgaged to you by us, and, if necessary, to sell any of it to make up any loss that may be sustained on the sale of the mill property.

We take this as a fit time to return you our very sincere thanks for all the indulgence you have extended to us in our efforts to erect the Kalmia Mills.

BENJAMIN F. EVANS.
BENJAMIN MORDECAI.

And on the twelfth day of February, 1868, the said Harvey Cogswell endorsed on the said letter as follows:

CHARLESTON, S. C., 12*th Feb.*, 1868.

Messrs. W. C. LANGLEY & Co., *New York:*

GENTLEMEN: The joint and several notes of me, Benjamin F. Evans, and Benjamin Merdecai to you for the purchase-money of the Kalmia Mills property, sold under foreclosure of two mortgages to you on 23d April, 1867, and purchased by me as trustee, which notes bear date the 10th day of May, 1867, being all past due, and being unpaid, I can interpose no objection to your making sale of the entire property conveyed to me in trust to pay the said notes, in pursuance of the powers and provisoes contained in the said deed of conveyance dated the 10th of May, 1867.

HARVEY COGSWELL, *Trustee.*

And your orators further show unto your honors, that after the receipt of the said letters, to wit, on the 12th day of February, 1868, they did, through their solicitor, notify the said Harvey Cogswell, trustee, and Benjamin F. Evans, president, of the Kalmia Mills, in writing, that they had, in pursuance of the powers and provisos contained in the conveyance of the tenth of May, 1867, hereinbefore stated, directed Messrs. Wardlaw & Carew, brokers, of Charleston, to sell the entire property embraced in the said conveyance at public auction, in Charleston, on Thursday, the 19th day of March, 1868, after full compliance with the terms prescribed in the said deed, by advertisement for thirty days in Charleston and in New York, and that they would be notified of the result of the said sale, would be required to unite in making title to the purchaser, if deemed necessary, and to give immediate possession of the property to the purchaser.

And your orators further show unto your honors, that the property has, in accordance with your orators' instructions, been advertised for sale on the nineteenth of March, 1868, at 11 o'clock, in Charleston, by

the said Wardlaw & Carew, both in Charleston and New York, since the 18th day of February, 1868, and that the said Harvey Cogswell has interposed no objection or obstacle to the said sale, but on the contrary has co-operated with your orators in all steps necessary to be taken to make the said property sell to the best advantage, and that an immediate sale of said property is necessary for the advantage of all persons having an interest therein, because the interest and expenses of insurance, and for the guarding and protecting said property, are still accruing and rapidly increasing the debt chargeable upon the property, while the property in its unfinished condition not only yields nothing, but will continue greatly and rapidly to deteriorate in value, more especially the machinery, which constitutes a very large part of the said property.

And your orators further show unto your honors, that since the said property has been placed in the hands of the brokers for sale, your orators have been informed that certain citizens of South Carolina, to wit, Francis L. Markey, Isaac Branch, and Daniel W. Branch,
8 copartners in the trade of carpenters and builders under the name and style of F. L. Markey & Co., have determined to interfere with the exercise by your orators of their rights and powers in relation to the property of the Kalmia Mills, and to prevent, hinder, and delay the sale of the said property by the said Wardlaw & Carew by the order and direction of your orators; that the said Markey & Co. are about, as your orators are informed and believe, and so charge, by their solicitors, Pressley, Lord & Inglesby, to file a bill in the court of equity of the State of South Carolina for Charleston district, praying an injunction against the said Wardlaw & Carew and your orators, to restrain them from proceeding with the said sale on the day advertised for such sale, as ordered and directed by your orators with the consent of the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, as hereinbefore fully stated.

And your orators further show, that they have been informed and believe that the grounds and pretexts set up by the said Markey & Co. for their proposed interference and suit are that they were the contractors with the Kalmia Mills for the carpenter's work in the mill building, and for the erection of the cottages for the operatives, erected upon the land of the said company, and as such contractors and mechanics, that they claim to have a lien upon the property directed by your orators to be sold under the power reserved to them for payment of the balance due to them on their contract, which lien they aver and allege to be prior and superior to the right and lien of your orators in and upon the said property, and that they have such rights and interests in said property as gives them the power and right to interfere with, postpone, and stop the sale.

And your orators further show, that they are not fully and accurately informed of the particulars of the claim set up by the said F. L. Markey & Co., but they are informed and believe, and so distinctly charge, that your orators' rights under the conveyance from the Kalmia Mills to Harvey Cogswell, hereinbefore fully stated, to have the property embraced in the said deed sold and the proceeds of sale applied to the payment and extinguishment of the debt due to them upon the promissory notes held by them, and the payment of which is secured by the express terms of said deed, is paramount to the claims of all other creditors of the said Kalmia Mills, or creditors of the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai.

And your orators are further informed and believe, and so charge, that the original contract was made with the said F. L. Markey & Co.

by the Kalmia Mills, and was subsequent to the mortgages to your orators by the said Kalmia Mills under which the sale of the twenty-third of April, 1867, was made; that the amount due by the said Kalmia Mills to the said Markey & Co. at the time of that sale was included in and embraced in the twenty thousand dollars bid by the said Harvey Cogswell, over and above the mortgage debt of your orators, for which a separate note was given, and assigned by your orators, to the said Kalmia Mills, as hereinbefore stated; that at the time of said sale the said F. L. Markey & Co. expressly acknowledged that they had no lien upon the said property by requiring and accepting from the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai a personal guarantee of their contract with the Kalmia Mills, and their personal indemnity against loss thereby; that whatever contract may have been made by the said F. L. Markey & Co. subsequent to the sale of the twenty-third of April, was made with the express notice and full knowledge of the state of the title to the property, and that it was held by the said Harvey Cogswell only upon trust, first, to pay to your orators the full amount of the debt due to them, and that any such contract could only create a personal obligation on the part of the said Harvey Cogswell and such other persons as made the said contract, as he or they had no right or power to encumber or charge the property held by him, in trust, to pay the debt due upon it to your orators, and could not give a lien which could interfere with the prior right and equities of your orators.

And your orators further show unto your honors that they are also informed that several other persons, citizens of the State of South Carolina, who are, or who claim to be, creditors of the Kalmia Mills and of Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, the purchasers of the property at the sale of twenty-third of April, 1867, have already instituted and are about to institute proceedings in the courts of law and equity of the State of South Carolina for the satisfaction of their debts out of the property now about to be sold in satisfaction of the prior debt due to your orators, and in derogation of the prior lien which your orators have upon said property; that the names of such persons and the nature of their claims are not known to your orators, but among them, your orators have been informed and believe, are George C. Goodrich, Philip Wineman, and John Ashhurst, citizens of South Carolina and copartners in trade under the name and style of Goodrich, Wineman & Co.; that the said Goodrich, Wineman & Co., as your orators are informed, are, by their solicitors, Messrs. Whaley,
9 Mitchell & Clancy, about to institute proceedings in some court of the State of South Carolina to enjoin, delay, or hinder the sale advertised to take place on the 19th day of March instant.

Your orators are not informed of the nature of the claim of the said Goodrich, Wineman & Co., but your orators believe that the said claim is for a debt contracted by the said Harvey Cogswell and the other purchasers of the property, since the sale of the twenty-third of April, 1867; and your orators charge that your orators' rights and liens are prior to all debts so contracted; and your orators are entitled to have the entire property embraced in the deed of the tenth of May, 1867, sold, and to be first paid from the proceeds of sale, before any of the individual creditors of the purchasers.

And your orators pray leave to make the said Goodrich, Wineman & Co. parties defendants to this their bill, as representatives of this class of creditors, and that they may be enjoined from instituting any proceedings to hinder or delay the sale directed to be made by your orators.

And your orators also pray that they may have leave to amend this their bill, by adding, when discovered, the names of any other persons who, as creditors of the Kalmia Mills or of the purchasers at the sale of 23d April, claim rights in derrogation of the prior rights of your orators in the premises, with apt words to charge them as parties defendant thereto.

And your orators are advised that as citizens of the State of New York they are entitled to have the aid of this honorable court in enforcing their rights under the conveyance of the tenth of May, 1867, and in completing the sale of the property embraced therein, under the power therein contained, as advertised by their direction, and in securing and perfecting the title of the purchaser at said sale; and that to this end they are entitled to the process of this honorable court to enjoin and restrain all creditors of the Kalmia Mills, and of Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, and other persons having pretence of right, from interfering with, hindering, or obstructing the sale of said property, under the trusts and powers contained in the said conveyance; and to have the surplus of the purchase-money which shall be paid for the said property when so sold, if any there should happen to be after your orators shall have been fully paid and satisfied, paid into this honorable court, to be distributed under the order of this court to such persons as shall be called in under the order of this court, and establish their right to the same, in order that your orators may be paid in accordance with the trusts of said deed, and that the title of the purchaser at such sale may be clear and unembarrassed by such conflicting claims.

In tender consideration whereof, and forasmuch as your orators can only have adequate relief in the premises in this honorable court, where matters of this sort are properly cognizable and relievable, to the end, therefore, that the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, "The Kalmia Mills," Francis L. Markey, Isaac Branch, and Daniel W. Branch, and the said George C. Goodrich, Phillip Wineman, and John Ashhurst may upon their several and respective corporal oaths full, true, direct, and perfect answer make to all and singular the matters hereinbefore set forth, as fully as if herein particularly interrogated thereto;

And particularly that they may fully and particularly set forth and discover all the facts and circumstances in relation to your orators' rights, powers, and liens in regard to said property; and in relation to the contract or contracts made with the said F. L. Markey & Co., and to all debts contracted since the 23rd of April, 1867, and whether the said contracts and debts were not subsequent to the accrual of your orators' rights and lien, and with express notice and full knowledge on the part of the said F. L. Markey & Co. and the said Goodrich, Wineman & Co. and all other creditors of the condition and title of said property, and of your orators' prior rights in relation thereto; and whether the debt due to the said F. L. Markey & Co., Goodrich, Wineman & Co., and all other persons, if any such exist, are not solely and entirely the debts of the Kalmia Mills, or the individual debts of the purchasers of said property, constituting no lien whatever upon the property now about to be sold under the trust for payment of the debt to your orators;

That the rights and powers of your orators in the premises and the priority of their lien may be declared and established by the decree of this honorable court; that the sale directed by your orators, and consented to by the said Harvey Cogswell, Benjamin F. Evans, and Ben-

jamin Mordecai, be decreed to go on; that the purchaser at the said sale may be protected by your orators paying into court the surplus of the sales-money, if any should happen to be after the payment of their debt, to be distributed under the order of the court; that the said Harvey Cogswell, Benjamin F. Evans, Benjamin Mordecai, and the said Kalmia Mills may unite in the conveyance to the purchaser, if required; that an injunction may issue out of this honorable court to restrain the said Francis L. Markey, Isaac Branch, and Daniel W. Branch, and the said George C. Goodrich, Phillip Wineman, and John Ashhurst, and all other persons, from instituting any proceedings at law or in equity in the courts of the State of South Carolina to prevent, hinder, or delay the sale of the entire property advertised to be sold on the nineteenth of March by your orators' direction, under the express power reserved to them as aforesaid; and that your orators may have such further and other relief as the nature of their case may require, and to your honors shall seem meet:

May it please your honors to grant unto your orators, not only writs of injunction to be directed to the said Francis L. Markey, Isaac Branch, and Daniel W. Branch, and the said George C. Goodrich, Phillip Wineman, and John Ashhurst, as hereinbefore prayed, but also a writ or writs of subpœna of the United States of America, directed to the said Harvey Cogswell, Benjamin F. Evans, Benjamin Mordecai, The Kalmia Mills, Francis L. Markey, Isaac Branch, and D. W. Branch, George C. Goodrich, Phillip Wineman, and John Ashhurst, commanding them and every of them at a certain day, and under certain pains therein to be specified, personally to be and appear in this honorable court and then and there to answer all and singular the premises, and to stand to, abide, and perform such order and decree in the premises as to your honors shall seem meet.

And your orators will ever pray, and so forth.

M. L. WILKINS,
Complainants' Solicitor.

THE STATE OF SOUTH CAROLINA:

Personally appeared before me W. C. Langley and made oath that the statements in the foregoing bill contained, so far as they are within his own knowledge, are true, and that those derived from the information of others he believes to be true.

WM. C. LANGLEY.

Sworn to before me this 14 day of March, A. D. 1868.

B. GORDON PRINGLE,
U. S. Commissioner.

10½ (Indorsed:) J. E. Hagood. Original bill. United States of America, South Carolina district, fourth circuit. W. C. Langley & Co. vs. Harvey Cogswell, Benjamin F. Evans, Benjamin Mordecai, The Kalmia Mills, Francis L. Markey, Isaac Branch, Daniel W. Branch, George C. Goodrich, Philip Wineman, John Ashhurst. Bill to enforce sale, and for injunction. Filed 9th March, 1868. M. L. Wilkins, complainants' solicitor.

11 *Subpœna ad respondendum.*

UNITED STATES OF AMERICA,
Fourth Circuit, State of South Carolina:

The President of the United States of America to Harvey Cogswell, Benjamin F. Evans, Benjamin Mordecai, Francis L. Markey, Isaac Branch, and Daniel Webb Branch, citizens of South Carolina, and The Kalmia Mills, a body politic and corporate by and under the laws of the State of South Carolina, George C. Goodrich, Philip Wineman, and John Ashhurst, citizens of South Carolina:

You are hereby strictly commanded and firmly enjoined, that, all manner of excuses being laid aside, you be and appear before the judges of the circuit court of the United States for the district of South Carolina, at Charleston, on the first Monday of April next, twenty days after the service thereof, then and there true and perfect answer to make, upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the bill of complaint of William C. Langley, Samuel Keyser, and Charles D. Cooke, citizens of the State of New York, copartners in trade in the city and State of New York under
12 the name and style of W. C. Langley & Co., and also that you do, on the rules day next immediately after the day appointed and expressed, file or cause to be filed in the registry of said court your plea, answer, or demurrer to the said bill of complaint.

Hereof fail not, under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the honorable Salmon P. Chase, Chief Justice of the United States of America, at Charleston, in South Carolina, district aforesaid, the 9th day of March, in the year of our Lord one thousand eight hundred and sixty-eight, and in the 92d year of the sovereignty and Independance of the United States of America.

M. L. WILKINS,
Complainants' Solicitor.

Which subpœna was returned endorsed as follows:

We appear for F. L. Markey & Co.

PRESSLEY, LORD & INGLESBY.

We appear for Goodrich, Wineman & Co.

WHALEY, MITCHELL & CLANCEY,
Defts.' Sol.

I accept service of this subpœna.

BENJAMIN MORDECAI.

I appear for Harvey Cogswell, Benjamin F. Evans, and The Kalmia Mills.

CH. RICHARDSON MILES.

13 And on the 16th day of March, 1868, came into court the said F. L. Markey, Isaac Branch, and D. W. Branch, by Pressley, Lord & Inglesby, their solicitors, and filed their answer to the said bill to enforce sale and for injunction; which answer is in words and of the tenor following:

Answer.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

The joint and several answer of Francis L. Markey, Isaac Branch, and Daniel W. Branch, copartners under the name and style of F. L. Markey & Co., to the bill of complaint of Wm. C. Langley, Samuel Keyser, and Charles D. Cooke, copartners in trade, carrying on business in the city and State of New York under the name and style of Wm. C. Langley & Co.

These defendants, saving and reserving to themselves all and all manner of exception to the manifold errors and uncertainties in said bill contained, for answer thereto, or to so much as they are advised it is important or material for them to answer to, nevertheless, answering, say:

That they are master mechanics, doing business under the name
14 and firm of F. L. Markey & Co.; that the Kalmia Mills, a body corporate under the laws of the State of South Carolina, being seized of a large tract of land in Edgefield District, on the twenty-seventh day of April, A. D. 1866, entered into an agreement with these defendants for the carpenter's work in the mill buildings, and for the erection of the cottages for the operatives, erected upon the lands of the said company, and for other work, all of which will more fully appear by reference to the said agreement, a copy of which is herewith filed and marked "Exhibit A;" that the said agreement was reduced to writing and signed by the parties thereto in the presence of one witness, and was duly recorded on the 17th April, 1867, in the office of the register of mesne conveyance for Edgefield District, in book M. M. M. at page 468 et seq., and from time constituted a valid and binding lien, superior to all other liens, except the mortgage to Langley & Co., upon the buildings so erected and improved by these defendants.

That shortly afterwards these defendants proceeded to carry out the said contract, and furnished at their own cost the labour and material necessary for the execution of the work contracted for under the agreement aforesaid, and fulfilled the same in all things on their part, so that the said Kalmia Mills at the time of the sale of the said property men-
tioned in the bill were indebted to these defendants in the sum of
15 several thousand dollars for the labour by them actually performed upon the premises, and for material furnished.

That subsequent to the making of the said contract with these defendants, but prior to the recording of the same, the said Kalmia Mills Company executed to the complainants the mortgages more particularly described in their bill, but these defendants are unable to say whether the same were duly recorded as is alleged, and upon this point they crave strict proof. And these defendants say that though at the time the said mortgages were given the contract entered into between the Kalmia Mills Company and themselves had not been recorded in the manner directed by the statute in such case made and provided, yet that the said Wm. C. Langley & Co. had full knowledge of the existance of the said contract and of the terms thereof.

That some time in the month of April, 1867, the said Wm. C. Langley & Co., pretending that default had been made by the said Kalmia Mills Company in payment of certain notes which the said mortgages had

been given to secure, in pursuance of the power and authority to them given in the said mortgages, placed the entire Kalmia Mills property in the hands of Wardlaw & Carew to be put up for sale at public auction; whereupon these defendants immediately notified the said Langley & Co., through their solicitor, of their intention to institute the necessary proceedings in this court to enjoin the said sale.

16 That, after considerable negotiation, an agreement was entered into on the 23rd day of April, A. D. 1867, between the solicitor of the said Wm. C. Langley & Co. and the solicitors of these defendants, to the following effect, to wit: That at the said proposed sale Benjamin F. Evins, Benjamin Mordecai, and Harvey Cogswell, who were stockholders largely interested in the said Kalmia Mills, should bid a sufficient amount to cover not only the indebtedness of the said company to Langley & Co., which then amounted to one hundred and ninety thousand dollars, or thereabouts, but also the entire floating debt of the said Kalmia Mills Company, including the debt due to these defendants, which said outstanding liabilities were estimated at twenty thousand dollars; and on the same day the said Benjamin F. Evans, Benjamin Mordecai, and Harvey Cogswell, by an instrument in writing under their hands and seals, endorsed on the above-mentioned written agreement entered into between the Kalmia Mills Company and these defendants, undertook, in the event of their purchasing the said property, to guaranty to these defendants the performance of the said contract, and to assume the same; and these defendants say that the said guaranty was regarded by them at the time as only an additional

17 security for the payment of the debt due to them, and deny that they ever admitted, as is alleged in the complainants' bill, that they had no lien upon the property, or that they ever agreed or intended to waive their said lien or their rights thereunder.

That, in consequence of this arrangement, these defendants withdrew further opposition to the said sale, and the property was accordingly exposed at public auction and purchased at the sum of two hundred and ten thousand dollars by Harvey Cogswell, who then and there declared that the said purchase was made for and in behalf of himself and of the said Benjamin F. Evans and Benjamin Mordecai and such other persons as should contribute to the purchase-money and come in and unite with them in the formation of a new company for the purpose of carrying on the contemplated enterprise. These defendants admit that by the said sale their lien was discharged; but submit to the judgment of this honorable court that the mortgage of the complainants was also discharged at the same time, and that both claims were put upon the same footing in the trust-deed given for the purchase-money.

These defendants, further answering, say that the terms on which the said property was so purchased, according to the printed advertizement published in the daily papers, were, one-third cash,

18 and the balance on a credit of six, nine, and twelve months, secured by a mortgage of the property.

These defendants further say that afterwards, in consequence of the alleged inability of the purchaser to raise the cash portion of the purchase-money, the said Langley & Co., without consultation with these defendants, or any of the other creditors of the said Kalmia Mills, undertook to vary the terms of the said sale, and agreed to accept from the said purchasers their promissory notes, under seal, for the entire amount of the purchase-money bid by the said Harvey Cogswell, without requiring from the said purchasers any payment in cash beyond the

amount necessary to defray the expenses of the sale; that in pursuance of this agreement the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai gave to the said Langley & Co. the promissory notes under their hands and seals specified in the complainant's bill, and at the same time the said complainants, as attorneys of the Kalmia Mills, executed to the said Harvey Cogswell a conveyance of the entire property described in the mortgage deeds upon certain trusts which these defendants believe are correctly set forth in complainant's said bill.

And these defendants, further answering, say that of these
19 notes the one for twenty thousand dollars was given to secure that portion of the purchase-money which was bound by statutory lien of these defendants, and should have been assigned to these defendants and not to the said Kalmia Mills Company; and they pray that the said Kalmia Mills Company may be directed to deliver up to them the said note.

These defendants further say that the said arrangement entered into by the said Langley & Co. and the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, subsequent to the said sale, whereby the said purchasers were released from the payment of the cash portion of the purchase-money, was made without the knowledge or consent of these defendants, who had a lien upon a portion *upon a portion* of the proceeds of said sale, and tended to their manifest wrong and injury, inasmuch as the debt with which the said property was thus encumbered was greatly increased, and its value as a security for the payment of the twenty thousand dollars' note in which these defendants were interested was proportionably diminished. And these defendants submit to the judgment of this honorable court that if the said property upon a future sale should prove inadequate to pay the whole amount of the said notes given by the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, then that the said note for twenty thou-
20 sand dollars should be first paid out of the proceeds of such sale, and any loss which may ensue from the insufficiency of said pro*pro*perty should be borne by the said Langley and Company, to the ex*t*ant that such deficiency has been caused by the unauthorized waiver on the part of said Langley & Co. of the payment of the cash portion of the purchase-money.

And these defendants further say that the said Langley & Co., well knowing that the property so purchased by the said Harvey Cogswell would be an inadequate security for the whole amount of the purchase-money, and that to charge so much thereof as represented the cash portion of said purchase-money (the payment of which had been so waived as aforesaid) upon the said property would be a fraud upon the rights of these defendants and the other creditors of the said Kalmia Mills Company, cotemporaneously with the execution of the said trust-deed, took from the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai the bond of indemnity and the mortgages to secure the same more particularly set forth in the said bill of complaint.

And these defendants further say that in the said bond and mort-
gage it was provided that the individual property so mortgaged
21 should only be liable after the property conveyed to the said Harvey Cogswell, trustee, shall have been sold and the proceeds applied to the payment of the said notes; whereas these defendants say, in justice and equity, the individual property so mortgaged should be primarily applied to the payment of so much of the said notes as were given in lieu of the cash portion of the purchase-money in exoneration

of the property charged with the payment of the debts due to these defendants and the other creditors of the said Kalmia Mills Company.

And these defendants further say that at the time of the said sale to the said Harvey Cogswell, it was distinctly understood between the said Harvey Cogswell Benjamin F. Evans, and Benjamin Mordecai and the said Langley & Co, and it was so expressed in the trust-deed, that the said purchasers should go on and complete the mills, manufactories, and other buildings which were then in the course of erection upon the said premises; and, accordingly, on the 11th day of June, A. D. 1867, the said Harvey Cogswell, trustee as aforesaid, with the privity and consent of his cestui que trusts, the said Langley & Co., entered into an agreement with these defendants whereby it was stipulated that for the work already done and to be done by these defendants they should be allowed and paid by the said trustee the sum of eighteen thousand dollars; and in consideration thereof these defendants agreed
22 to do certain work therein specified, which was necessary to the completion of the said factory, all of which will more fully appear by reference to the said agreement, a copy of which is herewith filed and marked "Exhibit ."

And these defendants further say that the said agreement was reduced to writing and signed by the parties thereto in the presence of one witness, and was duly recorded on the 8th day of August, A. D. 1867, in the office of the register of mesne conveyance for Edgefield District, in book N. N. N., at pages 130 et seq., and from that time constituted a valid and binding lien upon the buildings so erected and improved for the amount justly due to these defendants for the erection of such buildings and the improvements made thereon.

And these defendants say that from the time of the making of the said contract they continued to do and perform all things which were requisite and necessary to be done and performed by them under and by virtue of the said agreement as long as the means of the other contracting parties enabled them to carry on the work, and that there is now due to these defendants a very large sum of money, amounting in all to over eleven thousand dollars, for labor done and materials furnished by these
defendants.

23 And they further say that the said debt so due to them was contracted for the benefit of the said trust estate with the knowledge and approbation of the said Langley & Co., and under the powers given to the said Harvey Cogswell, trustee in the said trust-deed, to go on and complete the said building; and that the buidings erected by the labour and at the expense of these defendants constitute permanent improvements, and are, therefore, under the well-recognized doctrines of this court, and independent of their statutory lien, properly chargeable on the trust estate, to the extent that its value *that its value* has been thereby enhanced. And these defendants submit to the judgment of this honorable court whether the amount which shall be found due and owing to them is not paramount to the claim of the said Langley and Company and entitled to be first paid out of the proceeds of any sale that may be made of the trust estate.

And these defendants further say that the property now held by the said Harvey Cogswell, trustee, has cost, together with the improvements on the same, nearly or quite four hundred thousand dollars; and upon a fair market, and after full and extensive advertisement, can be readily sold at a price sufficient to pay and satisfy all claims upon it; but these
defendants cannot admit, as is alleged in the said bill, that it is for
24 the advantage of all persons having an interest therein that the

sale directed by the complainants should take place; but on the contrary they believe, and so charge, that unless restrained by the order of this court the said Langley & Co. intend to make the said sale with a view to advance their particular interest, under circumstances of haste and improvidence which must necessarily involve a ruinous sacrifice of the property.

And these defendants further say that believing, as they do, that the said sale will even'uate in great loss to them, they fully intend, if not enjoined by an order of this court, to appear at the time of the said sale and give notice that it is without due authority; and they have reason to believe that other creditors interested in the said property, who are not parties to these proceedings and cannot be affected by any order made therein, likewise intend by the same or similar means to hinder and obstruct the said sale. So that even if these defendants be enjoined from giving such notice at the said sale, yet it being given by others now unknown to these defendants or to the complainants, it will inevitably cause the property to be sold at great sacrifice unless their rights and claims be settled by the court before a sale should take place.

These defendants therefore fully concur with the complainants
25 in believing that it is absolutely indispensable that the aid of a court of equity should be invoked to carry into execution the trusts of the said deed, and that the sale of the said property, when made, should be made under the direction of this court, and in proceedings to which all persons in interest should be made parties, so that their conflicting claims can be adjusted and the title of the purchaser secured and perfected.

And as further reason why the said sale should not be allowed to go on, these defendants further say that the said Harvey Cogswell, trustee, is utterly insolvent, and the said Langley & Co. are citizens of New York, and reside without the limits of this State, so that if such sale take place, and the proceeds thereof pass into the hands of the said Cogswell, these defendants have no assurance whatever that the said funds which are liable to their claim will be safe pending the proceedings to try their rights; and if the said proceeds should pass into the hands of Langley and Company they would no longer be within reach of the process of this court.

And these defendants deny that there is any other matter or thing in the said complainants' said bill of complaint contained material and necessary for these defendants to make answer unto, and not hereby and herein well and sufficiently answered and confessed. And they
26 therefore pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

PRESSLEY, LORD & INGLESBY,
Defdts.' Solrs.

THE STATE OF SOUTH CAROLINA,
Charleston District:

Personally appeared before me Daniel W. Branch, and made oath that he is a member of the firm of F. L. Markey & Co.; that the matters and things alleged in the above and foregoing answer, so far as they come within his own knowledge, are true, and so far as they are derived from the information of others he believes them to be true.

D. W. BRANCH.

Sworn to before me this 16th day of March, A. D. 1868.

CHARLES INGLESBY,
Notary Public.

27 And on the 16th day of March, 1868, came into court the said Goodrich, Wineman and Company, by Whaley, Mitchell & Clancy, their solicitors, and filed their answer to the said bill to enforce sale and for injunction; which answer is in words and of the tenor following:

Answer.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

To the judges of the circuit court of the United States for the district of South Carolina:

The joint and several answer of George C. Goodrich, Philip Wineman, and John Ashhurst, citizens of the State of South Carolina, copartners carrying on business in the said State under the name and style of Goodrich, Wineman and Company, to the bill of complaint of William C. Langley, Samuel Keyser, and Charles D. Cooke, citizens of the State of New York, copartners in trade carrying on business in the city and State of New York under the name and style of W. C. Langley and Company, complainants.

These defendants, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and
28 other imperfections in the said complainants' said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, *these defendants*, answering, say: That they are informed and believe it to be true, as alleged in the complainants' said bill of complaint, that the Kalmia Mills are indebted to the said W. C. Langley and Company for divers large sums of money loaned by the said W. C. Langley and Company to aid them in the construction and completion of their factory, and that the said Kalmia Mills executed and delivered to the said W. C. Langley & Company a mortgage of all their real and personal estate to secure the payment of the sums of money so advanced. That upon the failure of the said Kalmia Mills to pay the said several sums of money when the same became due and payable, the said W. C. Langley and Company, after due notice given, proceeded to sell the mortgaged property at public auction in the city of Charleston, and that the entire mortgaged estate was bid in by Harvey Cogswell for the sum of two hundred and ten thousand dollars, being, as these defendants are informed, twenty thousand dollars in excess of the amount due W. C. Langley & Company at the time of the said sale.

29 These defendants, further answering, say that they are informed, and believe it to be true, that the said Harvey Cogswell became the purchaser of the said mortgaged premises in trust for the uses and trusts as are more particularly set forth in the complainants' said bill of complaint, and that Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai gave their joint and several notes for the payment of the purchase-money and executed a mortgage of the premises to secure the payment of the same, and that in addition to the mortgage of the property purchased, the said Benjamin F. Evans, Harvey Cogswell, and Benjamin Mordecai, under their joint and several bond of indemnity in the penal sum of one hundred thousand dollars as a further security to W. C. Langley and Company, and executed a mortgage of all their real

estate to the said W. C. Langley and Company to secure the payment of the said bond.

These defendants, further answering, say that the said Kalmia Mills, and the said Harvey Cogswell, representing the said Kalmia Mills under the trust, is indebted to them in the sum of dollars, and they *balance* that they are likewise indebted to other persons resident in the city of Charleston in various other sums, to the amount of twenty thousand dollars, and that the said W. C. Langley & Company are secured by their mortgage of the Kalmia Mills and its
30 property as to the several notes mentioned in the bill of complaint, and indemnified from all loss by the bond of the said Benjamin F. Evans, Harvey Cogswell, and Benjamin Mordecai, secured by a mortgage of their individual property, and these defendants have nothing to look to as a fund to pay their debt and the debts due to other Charleston creditors, except the property already under mortgage to the said W. C. Langley and Company. And these defendants, further answering, say that it would be inequitable and unjust to them that the Kalmia Mills property should be sold at the present time, when the crops have failed, and when there is little or no money here seeking investment, and when the unsettled condition of our political relations operates so powerfully to prevent capitalists from abroad, who are anxious to invest their large means, from venturing their money in so vast an enterprise.

These defendants, further answering, say that they are advised that notwithstanding the power of sale contained in the mortgage-deed, and which is to be exercised without resort to the courts, this mortgage cannot be foreclosed and the equity of redemption debarred without resort to the court of equity, because they say that the right of a mortgagor to redeem is an equity, so that it cannot be provided against by
31 any agreement which chancery will not relieve, nor can the right of redemption be closed by any agreement, since that would be to let in all manner of extortion and usury; that by the statute law of South Carolina the court may give a time not exceeding six months before the sale, and also a reasonable credit not exceeding twelve months on the sale of the property. And these defendants, further answering, say that they have been advised that that course has been pursued in the State courts, especially in these distressing times, in order to prevent the sacrafice of property and secure to creditors their equitable rights.

These defendants having answered all that they are advised it is material or necessary for them to answer, submit their rights to the protection of this honorable court, and ask to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WHALEY, MITCHELL & CLANCY,
Defts.' Solicitors.

STATE OF SOUTH CAROLINA:

Personally appeared before me , who, on oath, say that the facts set forth in the foregoing answer are true to the best of their knowledge and belief.

32 GEO. C. GOODRICH.
PHILIP WINEMAN.
JOHN ASHHURST.

Sworn to before me this 15th day of March, A. D. 1868.

[L. S.] THOS. R. EGLESTON,
Notary Public & Ex Officio Magistrate.

And on the 16th day of March, A. D. 1868, came into court the said Harvey Cogswell, by C. R. Miles, his solicitor, and filed his answer to the said bill to enforce sale and for injunction; which answer is in words and of the tenor following:

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

The separate answer of Harvey Cogswell, a defendant who is impleaded with Benjamin F. Evans and others, to the bill of complaint of W. C. Langley & Co.

This defendant, saving and reserving to himself all right of exception to complainants' said bill of complaint, for answer thereunto, or unto so much thereof as he is advised that it is necessary or material for him to make answer unto, answering, says he admits that the statements contained in said bill of complaint are all within this defendant's personal knowledge, and are true and accurate; and this defend-
33 ant admits that the said complainants are entitled to the relief prayed in their said bill, and this defendant concurs in the prayer of the said bill.

And this defendant, further answering, says that immediately after the filing of complainants' said bill of complaint, to wit, on the fourteenth day of March, A. D. 1868, this defendant made an affidavit to be submitted by the said complainants upon their motion for an injunction as prayed in said bill; that said affidavit contained a full and accurate statement of all the facts and circumstances within this defendant's knowledge connected with the case, and is fully responsive to the said bill of complainants; that said affidavit was submitted by the said complainants to and remains on file in this honorable court, and this defendant prays to refer to the said affidavit, the original of which is in this court and a copy of which is herewith filed as an exhibit marked "A," and that the same may be taken andconsidered as part of this his answer to said complainants' said bill of complaint.

And this defendant, having answered fully, prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

C. R. MILES,
Defdt.'s Solr.

34 *Exhibit A to answer of Harvey Cogswell.—Affidavit of Harvey Cogswell.*

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

W. C. LANGLEY & CO.
vs.
HARVEY COGSWELL ET AL.

Personally appeared before me Harvey Cogswell, who, being duly sworn, says that he has read the bill filed in this court in the above-entitled cause by W. C. Langley & Co., and that the facts stated in the said bill are all within deponent's personal knowledge, and are true and correctly stated.

This deponent admits to be true all the statements in relation to the sale of 23rd of April, of his purchase at said sale, of the agreement be-

tween the said W. C. Langley & Co. and deponent and his associates in the purchase of the property, the conveyance to deponent in trust, the bond of indemnity and mortgages, and deponent says that he believed at the time of entering into said agreement and executing said several instruments, that he was securing to the said W. C. Langley & Co. the first lien upon all the said property, and that the claims of all
35 other creditors of the Kalmia Mills and of deponent and the other purchasers of said property were subsequent to and subject to the said prior right and lien of the said W. C. Langley & Co. Deponent further admits that the statements in said bill of complaint are true, in relation to the default of payment of the notes given for the purchase-money, and of deponent's consent to the sale of the said property by the said W. C. Langley & Co., in accordance with the terms and condition of the conveyance to deponent of the 10th May, 1867; and deponent further says that he not only cannot resist the right of the said W. C. Langley & Co. to exercise their said power and to have the property sold for payment of their debt, which is rapidly increasing while their security is diminishing, but deponent is also of opinion that it is for the interest of himself and of the said Benjamin F. Evans and Benjamin Mordecai, who are individually liable for the said debt and whose individual property is also mortgaged for the same, that the said property embraced in said trust-deed shall be immediately sold and the proceeds applied to the extinguishment of said debt and the relief of this deponent and his associates; and deponent believes that it is also for the interest of all the creditors of deponent and his associates that the said sale should now take place, for he believes that if the said sale is postponed, the increase of the debt, and the deterioration of the
36 property itself, will more than counterbalance the advantages which may be conjectured to be derived from such an improved condition of the country as would be likely to enhance the saleable value of property.

And this deponent further says that he has read the affidavit made by Benjamin F. Evans in this cause, and that he fully concurs in the statements therein made as to the condition of the property and the reasons why it is desirable that the same shall be sold at this time.

And this deponent further says he believes that when the contract was made with F. L. Markey & Co. after the sale of 23rd of July, 1867, the said F. L. Markey & Co. had full and exact knowledge of the state of the title to the mill property, and that the same was held by deponent in trust first to pay the debt to the said W. C. Langley & Co.; and that the said F. L. Markey & Co. entered into said agreement and contract knowing that they had to look to the individuals who had purchased the property for payment and that they had no lien on the said property until the prior lien of the said W. C. Langley & Co. should be first satisfied. And deponent believes that the state of the title to the said
37 property and the fact that it was first charged with the payment of the debt to W. C. Langley & Co. were very generally and universally known to all those with whom deponent dealt and contracted debts in connection with the said property; and deponent has good reason to believe this to be the case in respect to the said Goodrich, Wineman & Co. because of the close and confidential business relations between the said Goodrich, Wineman & Co. and the said Benjamin Mordecai, who was associated with this deponent in the purchase of said property. And deponent further swears that he is not insolvent, as alleged by F. L. Markey & Co.

HARVEY COGSWELL.

Sworn to before me this 14th day of March, 1868.
CH. RICHARDSON MILES,
Not. Pub. & Ex Off. Mag.

And on the 16th day of March, A. D. 1868, came into court the said Benjamin F. Evans, by C. R. Miles, his solicitor, and filed his answer to the said bill to enforce sale and for injunction; which answer is in words and of the tenor following:

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

38 The separate answer of Benjamin F. Evans, a defendant who is impleaded with Harvey Cogswell and others, to the bill of complaint, for answer thereunto, or unto so much thereof as he is advised that it is necessary or material for him to make answer unto, answering, says he admits that the statement' contained in said bill of complaint are all within this defendant's personal knowledge, and are true and accurate; and this defendant admits that the said complainants are entitled to the relief prayed in their said bill, and this defendant concurs in the prayer of the said bill.

And this defendant, further answering, says that immediately after the filing of complainants' said bill of complaint, to wit, on the fourteenth day of March, A. D. 1868, this defendant made an affidavit to be submitted by the said complainants upon their motion for an injunction prayed in said bill; that said affidavit contained a full and accurate statement of all the facts and circumstances within this defendant's knowledge connected with the case, and is fully responsive to complainants' said bill; that said affidavit was submitted by the said complainants to, and remains on file in, this honorable court, and this defendant prays leave to refer to the said affidavit, the original of which re-
39 mains in this court and a copy of which is herewith filed as an exhibit, marked "A," and that the same may be taken and considered as part of this his answer to said complainants' said bill of complaint.

And this defendant, having answered fully, prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

C. R. MILES,
Defdt.'s Solr.

Exhibit A to answer of Benjamin F. Evans.—Affidavit of Benjamin F. Evans.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit.

W. C. LANGLEY & Co.
vs.
HARVEY COGSWELL ET AL.

Personally appeared Benjamin F. Evans, who, being duly sworn, says that he has read the bill filed in the circuit court of the United States for the district of South Carolina by W. C. Langley & Co., citizens o the State of New York, against Harvey Cogswell and others, citizens o

the State of South Carolina; that the facts as stated in the said bill are all within deponent's personal knowledge, and are true and correctly
40 stated; that this deponent was one of the original subscribers to and stockholders in the Kalmia Mills, a company incorporated by the legislature of South Carolina in 1864, and was and still is the president of the said company, and is fully and minutely acquainted with everything connected with the said Kalmia Mills, from the first inception of the enterprise to the present time.

That the two mortgages to the said W. C. Langley & Co., stated in their said bill to have been executed on the thirty-first day of July, A. D. 1866, and the third day of November, A. D. 1866, were executed by this deponent as president of the said company, by the authority and directions of the board of directors of the said company, and under the corporate seal of the said company; that the said mortgages embraced the entire property, real and personal, belonging to said company, except some notes and other choses in action, and were to secure the payments of the several notes of the said Kalmia Mills Company, signed by deponent as president, and endorsed by deponent individually, by Benjamin Mordecai, and Harvey Cogswell, for the amounts, and payable at the time and place stated in said bill.

That the money which these notes and mortgages were given to
41 secure was borrowed from the said W. C. Langley & Co. by this deponent as president of the Kalmia Mills upon his assurances of the value of the property, the prospects of the enterprise, and of the substantial responsibility of this deponent and the other endorsers of the notes by reason of the large amount of the property owned by them, and was borrowed with the firm conviction that it would enable them to complete the mill, and that they would thus be easily able to return it. That these reasonable expectations of this deponent, and those associated with him, were disappointed by causes beyond their ability to control, and they therefore could not prevent the sale of the mortgaged property by the said W. C. Langley & Co., under the power reserved to them in said mortgages; that the said sale was accordingly made in the manner and at the time fully set forth in the said bill.

That this deponent and the said Benjamin Mordecai and Harvey Cogswell being individually responsible for the entire debt to the said W. C. Langley & Co., by reason of their endorsement of the said notes, determined to b'y in the property at the sale for their own protection, provided they could arrange the terms with the said W. C. Langley & Co., who had given express notice at the said sale, by a written notice read by the auctione'r, that more favorable terms than those advertised,
42 viz, one-third cash, the balance in six, nine, and twelve months, would be given to approved purchasers; that having determined to bid for the property, they were advised that it was fair and just; that as this deponent was president and the said Benjamin Mordecai one of the directors of the said Kalmia Mills, they should bid for the property such an amount over and above the amount of the debt due to the said W. C. Langley & Co. as would cover the entire floating debt of the said company, so that they could not be called upon by the creditors of the company to account for any profit which they might make by the purchase of the said property.

That, accordingly, this deponent and the said Benjamin Mordecai directed the said Harvey Cogswell to bid for the said property the sum of twenty thousand ($20,000) dollars over and above the amount of the mortgage debt at which the property was put up for sale, they having computed that that amount, with the notes and choses in action which

belonged to the company, would pay every creditor in full; that the said bid was made by the said Harvey Cogswell, and, his being the only bid, the property was set down to him for himself and others to be named by him, and the property was conveyed to the said Harvey
43 Cogswell by deed executed by the said W. C. Langley & Co., as attorneys of the Kalmia Mills, in the manner fully set forth in said bill of complaint.

That between the time of said sale, viz, the 23rd of April, 1867, and the date of said conveyance, viz, 10th May, 1867, the arrangement set forth in the said bill was entered into between the said W. C. Langley & Co. and the said Harvey Cogswell, this deponent, and Benjamin Mordecai, by which the said W. C. Langley & Co. agreed to give to the purchasers of the property an extension of time for the payment of so much of the purchase-money as they were entitled to receive, leaving the $20,000 over their debt to be paid twelve months after the day of sale, which note was assigned by the said W. C. Langley & Co. to this deponent, as president of the Kalmia Mills, and is still held by deponent in trust for such of the creditors of said company as may be held to be entitled thereto, the said note not being payable until the 23rd day of April next, provided the said three purchasers would give to them the additional security of mortgages upon their individual property.

That this was done, notes under seal were given by the three purchasers for the entire amount of the purchase-money, and the property was conveyed to the said Harvey Cogswell upon trust, to pay the said notes, and the three purchasers also executed their bond of in-
44 demnity to the said W. C. Langley & Co., in the penal sum of $100,000, on condition to save them harmless from any deficiency of the purchase-money for which said property should be sold in paying all of the said notes, the said W. C. Langley & Co. covenanting to first sell the mill property and apply the proceeds to the payment of their debt before enforcing the mortgages of the individual property. The mortgages were also executed in pursuance of the agreement, as fully set forth in said bill.

That, again, the reasonable hopes and expectations of this deponent and his associates were, that they would be able to raise enough by subscriptions to the stock of a new company to enable them to complete their enterprise and save themselves and all their creditors from loss; that they directed all their energies to the accomplishment of this purpose, but the heavy expenses which they had to meet to secure and protect the property absorbed all their available means, and when the several notes fell due they were unable to meet them. That after the largest note fell due, in January, 1868, this deponent and the said Benjamin Mordecai requested the said W. C. Langley & Co. to forbear from exercising their right to sell the property until they could make the effort to raise sufficient capital for their enterprise in the Northern States;
45 which indulgence was kindly granted to them by the said W. C. Langley & Co.

That this effort having been fully and fairly made and having failed, this deponent could no longer call upon the said W. C. Langley & Co. to forbear the enforcement of their just rights, and, accordingly, this deponent and the said Benjamin Mordecai united in the request to the said W. C. Langley & Co. to take possession of and to sell the property, as set forth in the bill, and that the said Harvey Cogswell also united in the request.

That deponent, as president of the Kalmia Mills, has received the

written notice mentioned in the bill, and is willing and ready to comply with its requirements.

And this deponent further says that he believes that it is for the true interest of all persons interested in the said property, and of all creditors of the said Harvy Cogswell, Benjamin Mordecai, and this deponent, that the sale of said property should take place immediately for the following reasons: The interest upon the debt is very large, and is increasing said debt rapidly and largely; that the costs of keeping the property insured is also very large, and is being borne by the said W. C. Langley & Co., and is thus adding to the debt; that the cost of guarding and protecting the property is also considerable, which
46 is also being borne by the said W. C. Langley & Co. because of the present limited available means of Harvey Cogswell, Benjamin Mordecai, and this deponent, and is also being added to the debt; that a considerable portion, to wit, the large and valuable carpenter shop, saw-mill, blacksmith shop, wheelwright shop, machine shop, and other valuable parts of the property are not insured, and that responsible insurance companies have and do refuse to insure these valuable parts of the property, and consequently that they remain at the risk of those interested in said property, and that in the present condition of the property they are greatly endangered, and are necessarily so situated that the burning of any part will in all probability destroy the whole.

That the property itself is not only yielding no income, but in its unfinished condition is fast deteriorating in value; that many of the buildings in their unfinished condition are being fast injured by the action of the weather; that the tin-work on the roof of the large and valuable cotton-mill building has not been finished and painted, and is fast being ruined; that for the lack of the means to pay for finishing and painting it, not only is the tin roofing itself being much injured, but
47 that there are several leaks in the building, by which this building itself is receiving much harm; that the entire roof of the paper-mill building is lying out in the weather, and that if so exposed during the present summer it will be entirely ruined, as it will receive so much injury as to make it unsafe to use it for the purpose it was intended; that twenty-four (24) of the cottages remain without roofing, and are fast going to ruin; that the large quantity of sawed lumber at the mill, not having been stacked for drying but being intended for immediate use, is fast becoming warped and injured.

That the expensive earth embankment is being greatly washed and injured by ev'ry heavy rain-storm; that the machinery which constitutes a very large portion of the value of the property has for a long time been packed in cases, and has never been opened; that it has been and still is exposed to rust and injury, and has been and is constant cause of earnest solicitude to this deponent; that if the property is left in its present unfi'shed and unprotected condition during the summer months all these effects will be increased, and a large part of the true value of the property destroyed, as will as the already large debt greatly increased; that the superintendant of the South Carolina Railroad
48 Company has complained many times to this deponent that the track of said railroad company has and is being injured and the safety of their trains endangered by reason of the rising of the water on said track, caused by the dam to the main mill-pond at this property, and asked deponent to remedy said evil. And, lastly, that this deponent and those associated with him are entirely unable to abate or correct any of these evils.

That at this time considerable attention has been attracted to the said property, and to the valuable deposits of kaolin, ocher, buhr-stone, contained in it, and many persons, representing capitalists, have examined the property carefully, and deponent has good reason to believe that there will be such competition at the sale as will make the property bring a good price. And this deponent further says that not only is it the right of the said W. C. Langley & Co. to have this property sold and the proceeds applied to the extinguishment of their debt, already so large, so long delayed in payment, and so rapidly increasing, but deponent also believes that it is for the truest and best interest of himself and of the said Harvey Cogswell and Benjamin Mordecai that the property embraced in the trust-deed shall be at once sold, and the proceeds
49 applied to the extinguishment of their debt, and the balance of the debt, for which so much of their individual property is mortgaged, shall thus be fixed; that their individual property so mortgaged may also be applied to the payment of their debt, and this deponent and his associates be thus relieved from the burden of debt which has so long weighed upon them, and which prevents them from engaging in any other business which will afford support for themselves and their families.

And in relation to the claims of the creditors of the Kalmia Mills prior to the sale of the 23rd of April, 1867, this deponent says that the mortgages of the 23d of July and 3d of November, 1866, by the Kalmia Mills, to W. C. Langley & Co., gave to the said W. C. Langley & Co. a lien upon all of the property of said company, prior to the claims of all other creditors whomsoever, and that the sale of 23d April, 1867, under said mortgages, passed the entire property to the purchaser, free from all such claims except to the excess of the purchase-money over and above the mortgaged debt; that this excess is represented by the note for twenty thousand dollars ($20,000) held by this deponent, and this note also constitutes a lien upon the property, subsequent to the lien of the said W. C. Langley & Co., and the right of this class
50 of creditors will be fully protected under the decree prayed for in the said bill; that the surplus of the purchase-money for which the property shall be sold, after payment of Langley & Co., shall be paid into court for the benefit of these creditors.

And that, in relation to the claims of creditors which have accrued since the sale of the 23d April, 1867, under the mortgages before mentioned, this deponent says that every debt which was contracted by this deponent and his associates, the purchasers at the said sale, on account of their said purchase, was contracted with full and express notice to their said creditors of the exact condition of the title to the said property, and that the same was held by them only upon trust, expressly to pay, first, the debt due by them for the purchase-money, and that no creditor thus dealing with them, and with notice of the trust, can claim any lien upon the property expressly charged with the payment of this debt which shall interfere with or impair the said prior lien for the purchase-money; that these debts constitute the individual debts of this deponent and his associates in the purchase of the property, and that if the Mill property shall fail to bring a sum large enough to satisfy, first, the obligations to W. C. Langley & Co., and these debts, that
51 their individual property only is liable for the same.

And in relation to the claims of the said F. L. Markey & Co., this deponent says that the statements of the said bill are true; that the first contract of the Kalmia Mills with F. L. Markey & Co. was recorded subsequently to the execution and record of the two mortgages

of this deponent, as president of the Kalmia Mills, to W. C. Langley & Co., to wit, on the 17th day of April, 1867. That on the day of the sale of the said property, the 23d of April, 1867, the said Harvey Cogswell, Benjamin Mordecai, and this deponent, did endorse upon the said contract of the said Markey & Co. with the Kalmia Mills an agreement that if they became the purchasers of the property they would guarantee the performance of said contract, and would indemnify the said F. L. Markey & Co. from any loss from the failure of the said Kalmia Mills Co. to pay the amount due on said contract. That after the sale and conveyance to the said Harvey Cogswell, a long negotiation was had between the said F. L. Markey & Co. and this deponent, and the said Harvey Cogswell and Benjamin Mordecai, which resulted in the said parties, the purchasers of the property, making a new con-
52 tract with the said F. L. Markey & Co., which contract deponent believes was recorded. And deponent distinctly and positively affirms that the said F. L. Markey & Co., at the time of making the contract, had full, exact, and express notice of the condition of the title to said property, and that it was held by the said Harvey Cogswell upon the express trust to pay the expenses of the sale, next the notes to said W. C. Langley & Co., and lastly the note to the said Kalmia Mill', with power in the said W. C. Langley & Co. to sue the entire property upon default of payment of any of the said notes, and that they, the said F. L. Markey & Co., had to rely only upon the individual credit of the purchasers. That these facts were not only expressly and repeatedly stated to the said F. L. Markey & Co., by this deponent, but the individual partners of said firm repeatedly alluded to and recognized them to deponent in various ways, and especially by proposing to this deponent that, in order to help him in raising a new company to complete and carry on the mills, *that* they would subscribe as stock to such new company the entire amount due and to become due on their contracts with the Kalmia Mills and with Harvey Cogs-
53 well, trustee, as they feared that if this deponent could not induce others to join in a new company, *that* the whole property would again be sold, and that as the said lien of the said W. C. Langley & Co. had to be first satisfied, *that* they would have to come on the individual property of Harvey Cogswell, Benjamin Mordecai, and this deponent, and that they would very reluctantly be the means of injuring said Harvey Cogswell and this deponent to the extent of enforcing against their individual and private property a claim of theirs originating in and caused by the efforts of said Harvey Cogswell and this deponent to build these mills. That the said F. L. Markey & Co. expended no capital of their own upon their work at the Kalmia Mills, and that, during the time they have so worked, they have desired a support and home for themselves and for their families from the large sums paid to them by the Kalmia Mills, and by Harvey Cogswell, trustee; and that, from his knowledge of all the circumstances of this case, the said F. L. Markey, Daniel W. Branch, and Isaac Branch could not during the same time have earned for themselves so good a support anywhere else as they have had while working on the said contracts.

That the amount which may be justly due and owing to the
54 said F. L. Markey & Co. on these contracts, if any there should be, is only for work and labor and profits, if any there should be, and not for money expended by them; and this deponent further says that the claims, as he understands them, of the said F. L. Markey & Co. will, when examined, be found to be subject to many and large deductions, which will greatly reduce the amount which they claim as

due to them on these contracts. And in relation to the claims of Goodrich, Wineman & Co., and the other creditors of that class mentioned in said bill, deponent says that all and every such creditor dealt with said Harvey Cogswell, Benjamin Mordecai, and this deponent with full, complete, and express notice of the title to the property, and of the trusts upon which it was held by the said Harvey Cogswell, and that they can therefore have no just claim to any lien upon the said property, or any right to interfere with, hinder, or delay the said W. C. Langley & Co. in the enforcement of their prior rights and liens under the conveyance to Harvey Cogswell of the 10th of May, 1867.

BENJAMIN F. EVANS.

Sworn to before me this 14th day of March, A. D. 1868.

CH. RICHARDSON MILES,
Not. Pub. & Ex Off. Mag.

55 And on the 16th day of March, A. D. 1868, came into court the said Benjamin Mordecai, by Whaley, Mitchell & Clancy, his solicitors, and filed his answer to the said bill to enforce sale and for injunction; which answer is in words and of the tenor following:

Answer.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

The separate answer of Benjamin Mordecai, a defendant who is impleaded with Benjamin F. Evans and others, to the bill of complaint of W. C. Langley & Co.

This defendant, saving and reserving to himself all right of exception to complainants' said bill of complaint, for answer thereunto, or unto so much thereof as he is advised that it is necessary or material for him to make answer unto, answering, says he admits that the statements contained in said bill of complaint are all within this defendant's personal knowledge, and are true and accurate; and this defendant admits that the said complainants are entitled to the relief prayed in their
56 said bill, and this defendant concurs in the prayer of the said bill.

And this defendant, having answered fully, prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

WHALEY, MITCHELL & CLANCY,
Defdt.'s Solrs.

57 And on the 16th day of March, A. D. 1868, came into court the said Kalmia Mills, by C. R. Miles, its solicitor, and filed its answer to the said bill to enforce sale and for injunction; which answer is in words and of the tenor following:

Answer.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

The separate answer of "The Kalmia Mills," a body politic and corporate of the State of South Carolina, a defendant impleaded with Harvey Cogswell and others, to the bill of complaint of William C. Langley & Co.

This defendant, saving and reserving all right of exception to said

bill of complaint, for answer thereunto, or unto so much thereof as it is advised that it is necessary or material for it to make answer unto, answering, says that the statements of said bill of complaint are true and accurate, and the entire property of this defendant embraced in the two mortgages to the said complainants of the thirty-first of July and third of November, A. D. 1866, having been sold on the twenty-third day of April, A. D. 1867, under the powers reserved in the same, that the purchaser at said sale took the said property so sold and conveyed to him, freed and discharged from all liens and claims of subse-
58 quent creditors of this defendant; and this defendant's entire right and title to said mortgaged property became vested in the said purchaser; that this defendant was entitled to receive so much of the purchase-money as was in excess of the amount due to the said W. C. Langley & Co. under said mortgage, and accordingly the note of the purchasers for twenty thousand dollars, with interest from the day of sale, payable on the twenty-third day of April, 1868, was assigned by the said W. C. Langley & Co. to this defendant, and is now held by its president, Benjamin F. Evans, in trust for the creditors of this defendant, who are entitled thereto; and this defendant is ready to abide by and perform any decree which shall be made in relation thereto.

And this defendant, further answering, says that it is advised that it has no longer any title or interest in the property conveyed to Harvey Cogswell, in trust, on the tenth day of May, 1867, but that it is ready and willing to join in the conveyance to the purchaser, as prayed by said complainants, if ordered and decreed so to do; and this defendant is further advised that it is not bound by any contract made, nor responsible for any debts contracted, by the purchasers of said property at the sale of twenty-third of April, 1867.

And this defendant, having answered fully, prays to be hence dismissed with its reasonable costs and charges in this behalf sustained.

C. R. MILES,
Defdt.'s Solr.

59 And on the 16th day of March, A. D. 1868, came into court the said W. C. Langley & Co., by *his* solicitor, M. L. Wilkins, and filed *his* replication in the said court; which replication is in words and of the tenor following:

Replication.

W. C. LANGLEY & Co.
vs.
F. L. MARKEY & Co. ET AL. } Replication.

The replication of W. C. Langley & Co. to the several answers of F. L. Markey & Co., Goodrich, Wineman & Co., Harvey Cogswell, B. F. Evans, B. Mordecai, and the Kalmia Mills.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had or taken to the manifold uncertainties and insufficiencies of the said defendants' answers, for replication thereto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants; and that the said several answers are, and each thereof is, uncertain, evasive, and insufficient

in the law to be replied to by these repliants; without this, that any other matter or thing in the said answers contained material or effectual in the law to be replied unto by these repliants, and not here-
60 in and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct; and humbly pray as in and by their said bill they have already prayed.

M. L. WILKINS,
Complainants' Solicitor.

61 And on the 16th day of March, A. D. 1868, came into court the said F. L. Markey & Co., by Pressley, Lord & Inglesby, their solicitors, and filed their cross-bill for injunction and relief against Wm. C. Langley, Samuel Keyser, Charles D. Cooke, Harvey Cogswell, & The Kalmia Mills Company, Benjamin F. Evans, & Benjamin Mordecai; which cross-bill is in words and of the tenor following:

Cross-bill.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

To the judges of the circuit court of the United States for the district of South Carolina:

Francis L. Markey, Isaac Branch, and D. W. Branch, citizens of the State of South Carolina, carrying on business under the name and style of F. L. Markey & Co., bring this their bill against William C. Langley, Samuel Keyser, and Charles D. Cooke, citizens of the State of New York, copartners in trade carrying on business in the city and State of New York, Harvey Cogswell, Benjamin F. Evans, & Benjamin Mordecai, citizens of the State of South Carolina, the Kalmia Mills, a body politic incorporated by and under the laws of South Carolina; and thereupon your orators complain & say that the said Langley & Co., on the
62 19th day of March, 1868, filed their bill in this honorable court against your orators, Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, and George C. Goodrich, Philip Wineman, and John Ashhurst, copartners carrying on business under the name and style of Goodrich, Wineman & Co., praying, among other things, that the rights and powers of the said Langley & Co. in certain property embraced in a conveyance from the Kalmia Mills Company to Harvey Cogswell, trustee, and the priority of lien held by them upon the said property might be declared and established by the decree of this honorable court; that the sale of the said property directed by the said Langley and Co., under a power reserved to them in the said deed of conveyance, might be decreed to go on; that the purchaser at the said sale might be protected; that Harvey Cogswell, B. F. Evans, and B. Mordecai, and the Kalmia Mills might be directed to unite in the conveyance to the purchaser, if required, and that an injunction might issue out of this honorable court to restrain your orators and all other persons from instituting any proceedings at law or in equity in the courts of the State of South Carolina to prevent, hinder, or delay the sale of the property directed by the said Langley & Co. And your orators shew
63 that on the day of March they filed their answer to the said bill, setting forth their reasons for objecting to the said sale, and submitting their rights in the premises to the protection of this court.

And your orators shew, that they are master mechanics, doing business under the name and firm of F. L. Markey & Co.; that the Kalmia Mills being seized of a large tract of land in Edgefield district, on the 27th of April, 1866, entered into an agreement with these defendants for the carpenter's work in the mill buildings, and for the erection of the cottages for the operatives, erected upon the lands of the said company, and for other work, all of which will more fully appear by reference to the said agreement; that the said agreement was reduced to writing, and signed by the parties thereto, in the presence of one witness, and was duly recorded on the 17 April, 1867, in the office of the register of mesne conveyances for Edgefield District, in book M. M. M., page 468 et seq., and from that time constituted a valid and binding lien on the said property superior to all other liens, except the mortgage to Langley & Co.. hereinafter mentioned.

That shortly afterwards your orators proceeded to carry out the said contract, and furnished at their own cost the labour and material
64 necessary for the execution of the work contracted for under said agreement, and fulfilled the same in all things on their part, so that the said Kalmia Mills, at the time of the sale of the said property mentioned in the original bill, were indebted to your orators in the sum of several thousand dollars for the labour by them actually performed upon the premises and for material furnished.

That subsequent to the making of the said contract with your orators, but prior to the recording of the same, the said Kalmia Mills Company executed to the complainants the mortgages more particularly described in their original bill, but your orators are unable to state of their own knowledge whether the said mortgages were recorded in the proper office and within the time required by law.

That some time in the month of April, 1867, the said William C. Langley, in pursuance of the power given to them in the said mortgage, placed the entire Kalmia Mills property in the hands of Wardlaw & Carew, to be put up at public auction, whereupon your orators immediately notified the said Langley & Co., through their solicitors, of their intention to institute the necessary proceedings in this court to
65 enjoin the said sale. That after considerable negotiation an agreement was entered into between the solicitor of the said Langley & Co. and the solicitors of your orator to the following effect, to wit, that at the said proposed sale Benj. F. Evans, Benjamin Mordecai, & Harvey Cogswell, who were stockholders largely interested in the said Kalmia Mills, should bid a sufficient amount to cover not only the indebtedness of the said company to Langley & Co., which then amounted to about one hundred and ninety thousand dollars, but also the entire floating debt of the said Kalmia Mills Company, including the debt due to your orator, which said outstanding liabilities were estimated at twenty thousand dollars; & on the same day the said Benjamin F. Evans, Benjamin Mordecai, & Harvey Cogswell, by an instrument in writing under their hands & seals endorsed on the above-mentioned written agreement entered into between the Kalmia Mills Company & these complainants, undertook, in the event of their purchasing the said property, to guaranty to your orators the said contract & to indemnify your orators from any loss from the failure of the said Kalmia Mills Company to pay the amount due on said contract.

66 That in consequence of this arrangement your orators withdrew further opposition to the said sale, and the property was accordingly exposed at public auction, and purchased at the sum of two hundred and ten thousand dollars by Harvey Cogswell, who then and there de

in the law to be replied to by these repliants; without this, that any other matter or thing in the said answers contained material or effectual in the law to be replied unto by these repliants, and not here-
60 in and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct; and humbly pray as in and by their said bill they have already prayed.

M. L. WILKINS,
Complainants' Solicitor.

61 And on the 16th day of March, A. D. 1868, came into court the said F. L. Markey & Co., by Pressley, Lord & Inglesby, their solicitors, and filed their cross-bill for injunction and relief against Wm. C. Langley, Samuel Keyser, Charles D. Cooke, Harvey Cogswell, & The Kalmia Mills Company, Benjamin F. Evans, & Benjamin Mordecai; which cross-bill is in words and of the tenor following:

Cross-bill.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

To the judges of the circuit court of the United States for the district of South Carolina:

Francis L. Markey, Isaac Branch, and D. W. Branch, citizens of the State of South Carolina, carrying on business under the name and style of F. L. Markey & Co., bring this their bill against William C. Langley, Samuel Keyser, and Charles D. Cooke, citizens of the State of New York, copartners in trade carrying on business in the city and State of New York, Harvey Cogswell, Benjamin F. Evans, & Benjamin Mordecai, citizens of the State of South Carolina, the Kalmia Mills, a body politic incorporated by and under the laws of South Carolina; and thereupon your orators complain & say that the said Langley & Co., on the
62 19th day of March, 1868, filed their bill in this honorable court against your orators, Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, and George C. Goodrich, Philip Wineman, and John Ashhurst, copartners carrying on business under the name and style of Goodrich, Wineman & Co., praying, among other things, that the rights and powers of the said Langley & Co. in certain property embraced in a conveyance from the Kalmia Mills Company to Harvey Cogswell, trustee, and the priority of lien held by them upon the said property might be declared and established by the decree of this honorable court; that the sale of the said property directed by the said Langley and Co., under a power reserved to them in the said deed of conveyance, might be decreed to go on; that the purchaser at the said sale might be protected; that Harvey Cogswell, B. F. Evans, and B. Mordecai, and the Kalmia Mills might be directed to unite in the conveyance to the purchaser, if required, and that an injunction might issue out of this honorable court to restrain your orators and all other persons from instituting any proceedings at law or in equity in the courts of the State of South Carolina to prevent, hinder, or delay the sale of the property directed by the said Langley & Co. And your orators shew
63 that on the day of March they filed their answer to the said bill, setting forth their reasons for objecting to the said sale, and submitting their rights in the premises to the protection of this court.

And your orators shew, that they are master mechanics, doing business under the name and firm of F. L. Markey & Co.; that the Kalmia Mills being seized of a large tract of land in Edgefield district, on the 27th of April, 1866, entered into an agreement with these defendants for the carpenter's work in the mill buildings, and for the erection of the cottages for the operatives, erected upon the lands of the said company, and for other work, all of which will more fully appear by reference to the said agreement; that the said agreement was reduced to writing, and signed by the parties thereto, in the presence of one witness, and was duly recorded on the 17 April, 1867, in the office of the register of mesne conveyances for Edgefield District, in book M. M. M., page 468 et seq., and from that time constituted a valid and binding lien on the said property superior to all other liens, except the mortgage to Langley & Co.. hereinafter mentioned.

That shortly afterwards your orators proceeded to carry out the said contract, and furnished at their own cost the labour and material
64 necessary for the execution of the work contracted for under said agreement, and fulfilled the same in all things on their part, so that the said Kalmia Mills, at the time of the sale of the said property mentioned in the original bill, were indebted to your orators in the sum of several thousand dollars for the labour by them actually performed upon the premises and for material furnished.

That subsequent to the making of the said contract with your orators, but prior to the recording of the same, the said Kalmia Mills Company executed to the complainants the mortgages more particularly described in their original bill, but your orators are unable to state of their own knowledge whether the said mortgages were recorded in the proper office and within the time required by law.

That some time in the month of April, 1867, the said William C. Langley, in pursuance of the power given to them in the said mortgage, placed the entire Kalmia Mills property in the hands of Wardlaw & Carew, to be put up at public auction, whereupon your orators immediately notified the said Langley & Co., through their solicitors, of their intention to institute the necessary proceedings in this court to
65 enjoin the said sale. That after considerable negotiation an agreement was entered into between the solicitor of the said Langley & Co. and the solicitors of your orator to the following effect, to wit, that at the said proposed sale Benj. F. Evans, Benjamin Mordecai, & Harvey Cogswell, who were stockholders largely interested in the said Kalmia Mills, should bid a sufficient amount to cover not only the indebtedness of the said company to Langley & Co., which then amounted to about one hundred and ninety thousand dollars, but also the entire floating debt of the said Kalmia Mills Company, including the debt due to your orator, which said outstanding liabilities were estimated at twenty thousand dollars; & on the same day the said Benjamin F. Evans, Benjamin Mordecai, & Harvey Cogswell, by an instrument in writing under their hands & seals endorsed on the above-mentioned written agreement entered into between the Kalmia Mills Company & these complainants, undertook, in the event of their purchasing the said property, to guaranty to your orators the said contract & to indemnify your orators from any loss from the failure of the said Kalmia Mills Company to pay the amount due on said contract.

66 That in consequence of this arrangement your orators withdrew further opposition to the said sale, and the property was accordingly exposed at public auction, and purchased at the sum of two hundred and ten thousand dollars by Harvey Cogswell, who then and there de

clared that the said purchase was made by him for and in behalf of himself and of the said Benjamin F. Evans and Benjamin Mordecai, and such other persons as should contribute to the purchase-money and come in and unite with them in the formation of a new company for the purpose of carrying on the contemplated enterprise. Your orators admit that by the said sale their lien was discharged, but they charge that the mortgage of the complainants was also discharged at the same time, and that both claims were put upon the same footing in the trust-deed given for the purchase.

Your orators further shew, that the terms on which the said property was so purchased, according to the printed advertisement published in the daily papers, were one third cash, and the balance on a credit of six, nine, and twelve months, secured by a mortgage of the property.

That afterwards, in consequence of the alleged inability of the
67 purchaser to raise the cash portion of the purchase-money, the said Langley & Co., without consultation with your orators or any of the other creditors of the said Kalmia Mills, undertook to vary the terms of the said sale, and agreed to accept from the said purchasers their promissory notes under seal for the entire amount of the purchase-money bid by the said Harvey Cogswell, without requiring from the said purchasers any payment in cash beyond the amount necessary to defray the expenses of the sale; that in pursuance of this agreement the said Harvey Cogswell, Benjamin F. Evans, & Benjamin Mordecai gave to the said Langley & Co. the promissory notes under their hands & seals specified in the original bill, and at the same time the said Langley & Co., as attorneys of the Kalmia Mills, executed to the said Harvey Cogswell a conveyance of the entire property described in the mortgage-deeds upon certain trusts which your orators believe are correctly set forth in the original bill.

And your orators further shew, that of these notes the one for twenty thousand dollars was given to secure that portion of the purchase-money which was bound by the statutory lien of your orators, and should have been assigned to your orators, and not to the said Kalmia Mills Company.

68 Your orators further charge that the said arrangement entered into between the said Langley & Co. and the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai subsequent to the said sale, whereby the said purchasers were released from the payment of the cash portion of the purchase-money, was made without the knowledge or consent of your orators, who had a lien upon a portion of the proceeds of said sale, and tended to the manifest wrong and injury of your orators, inasmuch as the debt with which the said property was thus incumbered was greatly increased, and its value as a security for the payment of the twenty-thousand-dollar note in which your orators were interested was proportionably diminished; and your orators submit to the judgment of this honorable court that if the said property upon a future sale should prove inadequate to pay the whole amount of the said notes given by the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, then that the said note for twenty thousand dollars should be first paid out of the proceeds of such sale, and any loss which may ensue from the insufficiency of said property should be borne
69 by the said Langley & Co. to the extent that such deficiency has been caused by the unauthorized waiver on the part of said Langley & Co. of the payment of the cash portion of the purchase-money.

And your orators further shew, that the said Langley & Co., well

knowing that the property so purchased by the said Harvey Cogswell would be an inadequate security for the whole amount of the purchase-money, and that to charge so much thereof as represented the cash portion of said purchase-money (the payment of which had been so waived as aforesaid) upon the said property would be a fraud upon the rights of these defendants and the other creditors of the said Kalmia Mills Company, cotemporaneously with the execution of the said trust-deed took from the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai the bond of indemnity and the mortgages to secure the same, more particularly set forth in the original bill.

Further shew, that in the said bond it was provided that the individual property so mortgaged should only be liable after the property conveyed to the said Harvey Cogswell, trustee, shall have been sold and the proceeds applied to the payment of the said notes, whereas
70 your orators charge that in justice and equity the individual property so mortgaged should be primarily applied to the payment of so much of the said notes as were given in lieu of the cash portion of the purchase-money in exoneration of the property charged with the payment of the debts due to your orators and the other creditors of the said Kalmia Mills Company, and that the said arrangement, though valid and binding between the parties thereto, cannot deprive your orators of their right to have the said private property first exhausted before recourse is had to the property liable by your orators.

And your orators further shew, that at the time of the said sale to the said Harvey Cogswell it was distinctly understood between the said Harvey Cogswell, Benj. F. Evans, and Benjamin Mordecai and the said Langley & Co., and it was so expressed in the trust-deed, that the said purchasers should go on and complete the mills, manufactories, and other buildings which were then in the course of erection upon the said premises, and, accordingly, on the 11th day of June, 1867, the said Harvey Cogswell, trustee as aforesaid, with the privity & consent of his cestui que trusts, the said Langley & Co., entered into an agree-
71 ment with your orators whereby it was stipulated that for the work already done and to be done by your orators, your orators should be allowed and paid by the said trustee the sum of eighteen thousand dollars, and in consideration thereof your orators agreed to do certain work therein specified, which was necessary to the completion of the said factory, all of which will more fully appear by reference to the said agreement, a copy of which is filed as an exhibit with the answer of your orators to the original bill, and is marked "exhibit ."

And your orators further shew, that the said agreement was reduced to writing and signed by the parties thereto in the presence of one witness, and was duly recorded on the 8th day of August, 1867, in the office of the register of mesne conveyance for Edgefield District, in book M N N, at pages 130 et seq., and from that time constituted a valid and binding lien upon the buildings so erected and improved for the amount justly due to your orators for the erection of such buildings and the improvements thereon.

And your orators further shew, that from the time of the making of the said contract they continued to do and perform all things which were requisite and necessary to be done and performed by them
72 under and by virtue of the said agreement as long as the means of the other contracting parties enabled them to carry on the work, and that there is now due to your orators a very large sum of money, amounting in all to over eleven thousand dollars, for labour done and materials furnished by these defendants. And your orators charge

that the debts so due to them was contracted for the benefit of the said trust-estate, with the knowledge and approbation of the said Langley & Co., and under the powers given to the said Harvey Cogswell, trustee, in the said trust-deed, to go on and complete the said buildings; that the building so erected by the labour and at the expense of your orators constitute permanent improvements, and are therefore under the well-recognized doctrines of this court, and independent of their statutory lien, properly chargeable on the trust-estate to the extent that its value has been thereby enhanced. And your orators further charge that the amount which shall be found due and owing to them is paramount to the claim of the said Langley & Co., and entitled to be first paid out of the proceeds of any sale that may be made of the trust-estate.

And your orators further shew, that default having been made
73 in the payment of the said notes given for the purchase-money of the said property, the said W. C. Langley & Co., under and by virtue of the power of sale reserved in the said trust-deed hereinbefore set forth, have again, without consultation with, and against the expressed wishes of your orators and other persons equally interested with them in the said property, placed the same in the hands of their agents, Wardlaw & Carew, for the purpose of having it sold at public auction in Charleston, on Thursday the 19th day of March, 1868.

And your orators further shew, that, being firmly persuaded that a sale made under circumstances of such haste and improvidence must necessarily lead to a great sacrifice of the property, and thereby entail a heavy loss upon all interested therein, they have often and in a friendly way called upon the said W. C. Langley & Co. and their agents, Wardlaw & Carew, and have requested them to desist from their attempt to sell the said real estate, but this they have refused to do, so that by this inequitable use of the power improperly conferred on the said W. C. Langley & Co., in derogation of the rights of your orators and the other creditors of the Kalmia Mills, the interests of your orators are greatly endangered.

And your orators further show unto your honors, that the said
74 Harvey Cogswell, trustee, is utterly insolvent, and the said Langley & Co. are citizens of New York, and reside without the limits of this State, so that if such sale take place and the proceeds thereof pass into the hands of the said , your orators have no assurance that the said funds, which are liable to their claim, will be safe pending the proceedings to try their rights; & if the said proceeds are suffered to pass into the hands of Langley & Co., there is every reason to apprehend that they will be removed beyond the control of this court.

And your orators further shew, that they intend, if not enjoined by an order of this court, to appear at the time of the said sale and give notice that it is without due authority and in fraud of the rights of your orators, and they have reason to believe that other creditors interested in the said property, who are not parties to these proceedings and cannot be bound by any order made therein, likewise intend by the same or similar means to prevent, delay, and obstruct the said sale; so that even if these defendants be enjoined from giving such notice at the said sale, yet, it being given by others now unknown to your orators or
75 to the complainants in the original bill, it will inevitably cause the property to be sold at great sacrifice, unless their rights & claims should be settled by a decree of the court before a sale should take place.

Your orators are therefore advised that it is absolutely indispensable that the aid of this court should be invoked to carry into execution the

trusts of the said deed, and that the sale of the said property when made should be made under the direction of this court and under proceedings to which all persons in interest have been made parties; in order that their conflicting claims can be adjusted and the title of the purchaser secured & perfected.

In tender consideration whereof, and for as much as your orators can only have adequate relief in the premises in this honorable court, where matters of this sort are perfectly cognizable & relievable, to the end, therefore, that the said William C. Langley, Samuel Keyser, and Charles D. Cooke, Harvey Cogswell, Benj. F. Evans, B. Mordecai, and the Kalmia Mills may, upon their respective corporal oaths, full, true, direct, and perfect answer make to all and singular the matters hereinbefore set forth, as fully as if herein particularly interrogated thereto,
76 and that the said Langley & Co. may set forth and discover the amount due upon their said notes, and that they and their agents may be enjoined from proceeding any further under their advertisement in the sale proposed by them, or, in case such sale should be made, that the said Langley & Co. and Harvey Cogswell may be enjoined from receiving the proceeds thereof, and that the same may be paid into this court to be distributed under the order of the court, and that the said Harvey Cogswell may be enjoined from executing a conveyance of said premises to any person, and that the said Langley & Co. may be compelled to exhaust the private property mortgaged to them and the personal property covered by their mortgages before resorting to the real estate, upon which alone your orators have a lien, and that an account may be taken of the amount due to your orators under the contracts hereinbefore set forth, and that the sum ascertained to be due for work done and materials furnished since the 23d of April, 1867, may be declared to be a debt due by the said trust-estate and
77 may be paid out of the proceeds of any sale of said estate prior to the debt due to Langley & Co., or all other claims whatsoever, and that the said Kalmia Mills may be directed to deliver up to the proper officer of this court the separate note for twenty thousand dollars assigned to them by the said Langley & Co., and that the same may be collected and the proceeds applied in the first instance to the payment of any balance due to your orators under the contract entered into between the Kalmia Mills & themselves on the 27th of April, 1866, & then to the satisfaction of the other creditors of the Kalmia Mills, and that the said Benjamin F. Evans, Benjamin Mordecai, & Harvey Cogswell may be decreed, should the said property be insufficient to pay the amount due to your orators by the Kalmia Mills Company, to pay to your orators any balance that may be due to them by the Kalmia Mills Company on their contract with the said company, according to the terms of their guaranty endorsed thereon; and that all the property embraced in the trust-deed may be sold by an order of this court, at such times and on such credit and in such parcels as may be most
78 for the interest of all concerned therein, and that the proceeds of such sale or sales as may be distributed amongst the several claimants who may be called in under the order of this court and establish their right to the same according to their respective rights & priorities: May it please your honors to grant unto your orators not only writs of injunction, to be directed to the said W. C. Langley, Samuel Keyser, & Charles D. Cooke, and the said Harvey Cogswell, as hereinbefore prayed, but also a writ or writs of subpœna of the United States of America, directed to the said W. C. Langley, Samuel Keyser, Charles D. Cooke, Harvey Cogswell, Benjamin F. Evans, & Benjamin

Mordecai & the Kalmia Mills, commanding them and every of them at a certain day, & under certain pains therein to be specified, personally to be and appear in this honorable court, and then and there to answer all and singular the premises and to stand to, abide, and perform such order and decree in the premises as to your honors shall seem meet.

And your orators will ever pray, & so forth.

PRESSLEY, LORD & INGLESBY,
Complainants' Solicitors.

79 STATE OF SOUTH CAROLINA,
Charleston District:

Personally appeared before me Daniel W. Branch, and made oath the matters and things alleged in the foregoing bill, so far as they come within his knowledge, are true, and so far as they are derived from the information of others he believes them to be true. Deponent further swears that he is a member of the firm of F. L. Markey & Co.

D. W. BRANCH.

Sworn to before me this 16th day of March, A. D. 1868.

CHARLES INGLESBY,
Not. Pub.

Subpœna ad respondendum.

UNITED STATES OF AMERICA,
Fourth Circuit, State of South Carolina:

The President of the United States of America to William C. Langley, Samuel Keyser, Charles D. Cooke, Harvey Cogswell, The Kalmia Mills, Benjamin F. Evans, & Benjamin Mordecai:

You are hereby strictly commanded and firmly enjoined that, all
80 manner of excuses being laid aside, you be and appear before the judges of the circuit court of the United States for the district of South Carolina, at Charleston, on the first Monday of April next, twenty days after the service thereof, then and there true and perfect answer to make, upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the bill of complaint of Francis L. Markey, Isaac Branch, & Daniel W. Branch, copartners under name of F. L. Markey & Co.

And also that you do, on the rules day next immediately after the day appointed and expressed, file or cause to be filed in the registry of said court your plea, answer, or demurrer to the said bill of complaint.

Hereof fail not, under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the honorable Salmon P. Chase, Chief-Justice of the United States of America, at Charleston, in South Carolina district aforesaid, the sixteenth day of March, in the year of our Lord one thousand eight hundred and sixty-eight, and in the 92 year of the sovereignty and Independence of the United States of America.

[SEAL.] PRESSLEY, LORD & INGLESBY,
Complainants' Solicitors.

DANL. HORLBECK, *Clk. Cir. Ct.*

81 Which subpœna was returned endorsed as follows:

I accept service of the subpœna for Harvey Cogswell, The Kalmia Mills, W. C. Langley & Co.
16th March, 1868.

CH. RICHARDSON MILES,
Defendants' Solicitor.

We accept service for Benjamin Mordecai.
16th March, 1868.

WHALEY, MITCHELL & CLANCY,
Solicitor'.

And on the 16th day of March, A. D. 1868, came into court the said W. C. Langley & Co., by M. L. Wilkins, their solicitor, and filed their answer to the said cross-bill for injunction and relief; which answer is in words and of the tenor following:

Answer.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

The joint answer of William C. Langley, Samuel Keyser, and Charles D. Cooke, citizens of New York, copartners in trade in the city of New York under the name and style of W. C. Langley & Co.,
82 defendants impleaded with Harvey Cogswell and The Kalmia Mills and others, to the cross-bill of complaint of Francis L. Markey, Isaac Branch, and Daniel W. Branch, filed in this court.

These defendants, saving to themselves all right of exception to the said cross-bill, for answer thereunto, or unto so much thereof as they are advised it is necessary or material for them to make answer unto, answering, say that in relation to the said complainants and their contracts with the Kalmia Mills and Harvey Cogswell these defendants know nothing of their own personal knowledge, and can neither deny nor admit the several allegations of the said complainants in relation thereto; but these defendants pray that all statements and allegations made in their said cross-bill may be required by this honorable court to be strictly proved whenever the same may affect the interest of these defendants.

But these defendants do deny that they ever had any negotiation with the said complainants, actual or constructive, either before or after the sale of the Kalmia Mills property on the twenty-third of April, 1867, under the powers contained in the two mortgages to these
83 defendants, as fully stated in defendants' original bill; and these defendants do not know, of their own knowledge, the exact nature of the negotiation alluded to in complainant's bill between the said complainants and the solicitor who then represented these defendants, and who was also the solicitor of the Kalmia Mills and of the said Harvey Cogswell and the other purchasers of the property; but these defendants believe it to have been in substance and to the effect stated by them in their original bill.

And these defendants, further answering, say that they were authorized by the terms of the said mortgages to sell either for cash or

eredit, at their option; that they did advertise the property to be sold for one-third cash, balance in six, nine, and twelve months, but that they did authorize and instruct the auctioneers to give notice at said sale that more accommodating terms would be afforded approved purchasers; that the agreement which these defendants entered into with the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecia after the said sale was made in pursuance of what they were advised was within their power and discretion, and they never conceived that said agree-
84 ment could be construed as a waiver or postponement of their distinct prior lien upon all the property of the Kalmia Mills sold under said mortgages, and their first lien upon the individual property of the said purchasers mortgaged to them as collateral and additional security for their debt; that, on the contrary, they believed and were advised that the said agreement, the conveyance to Harvey Cogswell in trust on the tenth of May, 1867, and the bond of indemnity and mortgages executed by the said purchasers, all distinctly expressed and enforced in a legal manner this their distinct prior right and lien; and these defendants say that if these said several instruments are in any degree or manner defective and deficient in the full, exact, and legal expression of this their right, and, according to their strict and technical import, do not protect and effect the same, that then the same were executed and consented to by these defendants in ignorance and mistake of fact, and they pray to be relieved by this honorable court as a court of equity having power so to do from the strict legal effect of said instruments so far as the same is contrary to their true and equitable meaning and intent, to wit, to secure to these the continuance of their
85 acknowledged priority over all other creditors of the said Kalmia Mills and of the purchasers of the property.

And these defendants, further answering, deny that the bond of indemnity and mortgages of the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai were given for the purpose stated in the said cross-bill, or that they were intended for any other purpose than that which is stated in complainant's original bill as an additional security to these defendants for the repayment of the money loaned by them originally to the Kalmia Mills upon the endorsement of the three individuals before named and the mortgages of the property; that the said additional security will operate for the benefit of the complainants and other creditors, provided the property so mortgaged shall sell for more than enough to pay the balance of the debt which now remains due to these defendants, after applying the proceeds of the sale of the mill property thereto.

And these defendants, further answering, say that the agreement and covenant by them made to sell the Kalmia Mills property and apply the proceeds to the payment of their debt before enforcing the mortgages on the *the* individual property is legal and is binding upon these
86 defendants, and can be enforced by the parties with whom said covenant was made.

And these defendants, further answering, say that after the sale of the twenty-third of April and conveyance of the tenth of May, 1867, they being in New York and relying upon the priority of their lien on the property for payment of their debt, knew nothing of the contracts and agreements made by the said Harvey Cogswell and his copurchasers in relation to said property, and they deny that such contracts and agreements, either with the complainants or others, were made with their privity and consent as charged in said cross-bill, and they also deny that any such contracts or agreements could interfere with, post-

pone, or diminish the existing prior lien and right of these defendants as set forth in the conveyance of the said property, of which all persons dealing with said property were presumed to have notice; and these defendants submit that the sale, deeds, agreements, and other acts and things herein and in their original bill fully set forth give to these defendants rights and liens which in this honorable court will be
87 declared to have priority to all subsequently accruing liens, whether by mortgages, judgements, or otherwise howsoever, and they pray that the same may be so ordered and decreed by this honorable court.

And these defendants, further answering, say that they admit that when they took possession of the property held in trust for the payment of their debt, and placed the same in the hands of the brokers for sale at public auction, in accordance with the written request of the said Benjamin F. Evans, Benjamin Mordecai, and Harvey Cogswell, the purchasers thereof, and in accordance with the power expressly reserved to them, *that* they did not consult with the said complainants or any other persons now setting up rights and interests in said property, and these defendants submit that they were under no obligations so to do; but, on the contrary, these defendants aver that they had the full and perfect right to make the said sale in compliance with the terms of their power, and they pray that their said right may be enforced by the decree and order of this honorable court, and that the complainants and all other persons may be restrained and enjoined by the decree of the court from interfering with the said
88 sale, either in the manner threatened in said cross-bill of complainants or in any other manner.

And these defendants, further answering, say that they are ready and willing to exhibit an exact statement of their account with the purchasers of the Kalmia Mills property, and to shew the amount of principal and interest due to these defendants, if ordered and required by this honorable court so to do, but they submit that under the terms of the trust-deed they are authorized and empowered to pay and reemburse themselves out of the proceeds of sale, and to return the overplus, if any should happen to be, to those entitled to the same; and this overplus they have, in their original bill, prayed to be allowed to pay into court to be distributed under its order.

And these defendants, further answering, pray leave to refer to the affidavit made by Benjamin F. Evans and offered by these defendants in the original cause instituted by these defendants in this honorable court upon a motion for injunction against said complainants,
89 the original of which is on file with the papers of said cause and a copy of which is herewith filed as an exhibit hereto, for a full statement of the contract between the said complainants and the said Kalmia Mills, and Harvey Cogswell and the said Benjamin F. Evans, and also for the statement of the present condition of the property advertised to be sold, and the reason why an immediate sale of the same is for the interest of all parties concerned in the said property.

And these defendants, praying the protection of this honorable court in the due enforcement of their just rights, pray that the said cross-bill of the complainants may be dismissed with costs.

M. L. WILKINS,
Defendants' Sol'or.

STATE OF SOUTH CAROLINA:

Personally appeared before me William C. Langley, and made oath that the statements in the foregoing answer contained, so far as they

are within his own knowledge, are true, and that those derived from the information of others he believes to be true.

W. C. LANGLEY.

Sworn to before me this sixteenth day of March, A. D. 1868.

B. GARDEN PRINGLE,
U. S. Commissioner.

90 And on the 16 day of March, A. D. 1868, came into court the said Markey & Co., by their solicitors, Pressley, Lord & Inglesby, and filed their replication in the said court; which replication is in words and of the tenor following:

Replication.

F. L. MARKEY & Co.
vs.
W. C. LANGLEY & Co.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had or taken to the manifold uncertainties and insufficienc'es of the said defendants' answer, for replication thereto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants; and that the answer of the said defendants is uncertain, evasive, and insufficient in law to be replied to by these repliants, without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto by these repliants, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by their said bill they have already prayed.

PRESSLEY, LORD & INGLESBY,
Complainants' Solicitors.

91 And on the 18 day of March, A. D. 1868, came into court the solicitors in this cause, to wit, Pressley, Lord & Inglesby, Whaley, Mitchel & Clancey, Ch. Richardson Miles, and M. L. Wilkins, and consented to the court passing the following decree; which decree is in words and of the tenor following:

Decree.

W. C. LANGLEY & Co.
vs.
HARVEY COGSWELL ET AL.

F. L. MARKEY & Co.
vs.
HARVEY COGSWELL ET AL.

On hearing the bill & cross-bill in this case, the answers of defendants, the several affidavits, and pending the argument of counsel, it is ordered that the sale of the Kalmia Mills property advertized by Wardlaw & Carew, auctioneers, to take place to-morrow, the 19th inst., at 11

o'clock, by direction of W. C. Langley & Co., be permitted to proceed, provided that the said property at said sale be not sold for a sum less than one hundred & sixty thousand dollars; and that forty thousand dollars of the credit portion of the purchase-money be retained to stand
in place of the property, and subject to the liens and equities of
92 the several parties, and subject to the further order of the court.

GEO. S. BRYAN,
U. S. Judge Dist. S. C.

18 MARCH, 1868.

We consent:

PRESSLEY, LORD & INGLESBY.
WHALEY, MITCHELL & CLANCY.
CH. RICHARDSON MILES.
M. L. WILKINS.

And on the 20th day of March, A. D. 1868, came into court the solicitors in this cause, to wit, Pressley, Lord & Inglesby, Whaley, Mitchell & Clancy, M. L. Wilkins, and Ch. Richardson Miles, and consented to the court passing the following decree; which decree is in words and of the tenor following:

Decree.

UNITED STATES OF AMERICA:

Fourth circuit South Carolina district. In equity.

W. C. LANGLEY & CO.
vs.
HARVEY COGSWELL ET AL.

F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO. ET AL.

On hearing the pleadings in these cases, and with the consent
93 of all the solicitors in the causes, it is ordered that the sale of the Kalmia Mills property embraced in the conveyance of the 10th of May, 1867, to Harvey Cogswell, in trust, made by Wardlaw & Carew, auctioneers, on the 19th March inst., under the previous order of this court, to William C. Langley for one hundred and sixty thousand (160,000) dollars, be, and the same is hereby, confirmed; and it is further ordered that the said Harvey Cogwell, trustee, do convey the said property absolutely and in fee-simple to the said W. C. Langley, subject to the condition and proviso made in the previous order of this court. "that forty thousand ($40,000) dollars of the credit portion of the purchase-money be retained to stand in the place of the property, and subject to the liens and equities of the several parties, and subject to the further order of this court.

And it is further ordered that the Kalmia Mills do join in the said conveyance to W. C. Langley, if required.

And it is further ordered that the said cases be referred to James Tupper, esquire, as special referee to enquire into and report upon the facts stated in the pleadings and the several questions and equities therein raised and suggested, with leave to report any special matter.

94 And it is further ordered that the said referee do by public advertisement, in such manner and for such time as shall be directed by the solicitors in the cause, call upon all creditors of the said Kalmia Mills, and of the said Harvey Cogswell, trustee, to come in and prove before the said referee their claims upon the said property, by a day to be fixed in said notice or to be barred from any benefit under this decree; and that the said referee do report the amount of the said several claims so established before him, with the evidence upon the same, to this court.

And it is further ordered that all the rights and equities of the several parties be reserved until the coming in of said report and the further decree of this court, and that the several parties have leave to come in at the foot of this decree and apply, from time to time, in term time or at chambers, for such other and further orders as may be necessary in the progress of the cause.

GEO. S. BRYAN,
U. S. Judge, Dist. S. C.

20TH MARCH, 1868.

We consent.

PRESSLEY, LORD, & INGLESBY.
WHALEY, MITCHELL, & CLANCEY.
M. L. WILKINS.
CH. RICHARDSON MILES.

95 And on the 22nd day of April, A. D. 1868, came into court the said James Tupper, special referee, and filed his report; which report is in words and of the tenor following:

Report.

96 UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

W. C. LANGLEY & CO.
vs.
HARVEY COGSWELL ET AL.

F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO. ET AL.

To the honorable the judges of the circuit court of the United States for the fourth circuit:

These cases were referred to me as special referee by an order of his honor Judge Bryan, made on the 20th of March last, "to inquire into and report upon the facts stated in the pleadings and the several questions and equities therein raised and suggested, with leave to report any special matter.

At the request of the solicitors in the causes, I respectfully report, as "special matter," that the sale of the Kalmia Mill property on the 19th March to W. C. Langley, for the sum of one hundred and sixty thousand (160,000) dollars, which was confirmed by the said decretal order of the 20th March, upon

97 condition that forty thousand (40,000) dollars of the credit portion of the purchase-money shall be retained to stand in place of the property and subject to the liens and equities of the several parties, and subject to the further order of the court, not being sufficient to satisfy the debt due to the said W. C. Langley & Co., even if the whole of the said $160,000 purchase-money should be applied to the payment of their debt, the said W. C. Langley claim that the bond of indemnity of Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, given to the said W. C. Langley & Co. to indemnify them from all loss or damage which they shall sustain by reason of the insufficiency of the proceeds of sale of the mill property conveyed to Harvey Cogswell, in trust, to pay their said debt, is forfeited and the condition broken, and that they, the said W. C. Langley & Co., have the right to enforce the mortgages of their individual property given by the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai to secure the said bond of indemnity, as set forth in the original bill and the cross-bill in these causes.

The bond of indemnity and these mortgages have been produced before me. The bond of indemnity is as set forth in the original
98 bill, (p. 4.) The mortgage from Benjamin F. Evans and Harvey Cogswell to W. C. Langley & Co. is dated the 18th day of June, 1867, and embraces a lot of land on the south side of Broad street, in the city of Charleston, extending through to East Bay, having a front of about 33 feet 8 inches on Broad street, about 23 feet 4 inches on East Bay street, with a four-story brick building thereon, the joint property of Benjamin F. Evans and Harvey Cogswell. Also a lot of land in the city of Columbia containing three and a half (3½) acres, on Lady street, Gervais street, Huger street, and Pulaski street, the joint property of the said Benjamin F. Evans and Harvey Cogswell. Also a vacant lot on Laurel street, in the city of Columbia, measuring 208 feet on Laurel street and 150 feet on Marion street, the property of the said Benjamin F. Evans. Also the lot and dwelling-house thereon situated on Henderson street, in the city of Columbia, and containing ($\frac{47\frac{1}{2}}{100}$) forty-seven and a half hundredths of an acre, the property of the said Harvey Cogswell. The mortgage from Benjamin Mordecai is dated the second day of August, 1867, and embraces:

A lot of land with the buildings thereon at southeast corner of
99 Wentworth and St. Philip streets, Charleston, containing in front, on Wentworth street, 51 feet; on the south line, 50 feet; in depth, on St. Philip's street, 134 feet 6 inches; and on the east line, 153 feet 8 inches.

A vacant lot on southwest corner of Broad and Friend streets, in Charleston, measuring in front, on Broad street, 95 feet, and in depth 139 feet 10 inches.

A vacant lot joining the last above described, to the west, containing in front, on Broad street, 44 feet, and in depth 142 feet.

A vacant lot on north side of Wentworth street, Charleston, next to the artesian well, formerly consisting of three lots containing together in front, on Wentworth street, 52 feet by 102 feet in depth.

Several tracts of land in the counties of Suawannee, Columbia, and Hamilton, in the State of Florida, containing in all about 12,000 acres, more or less. The said mortgages each contain covenants giving to the mortgagees power, upon default and failure to perform the condition of the bond of indemnity, to sell the mortgaged property at public sale after thirty days' advertisements, without resorting to a court of law or equity for foreclosure or sale; the mortgagees returning the over-

plus, if any should happen to be, from the nett proceeds of sale, al
100 expenses being first deducted, after paying themselves all such amounts as they shall or may be entitled to under the said bond of indemnity, to the mortgagors; and to carry out this power, the mortgagees are constituted the attorneys irrecovable of the mortgagors, to execute and deliver titles to the purchasers in fee-simple, with such covenants as are usually inserted in conveyances in fee-simple.

I further report that on the 20th of March W. C. Langley & Co. did notify the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, in writing, of their intention to place the mortgaged property in the hands of a broker for sale, and that on the same day the said parties did, in writing, consent and agree to the said sale being made, and did agree to co-operate with the said W. C. Langley & Co. in the accomplishment of the same.

That accordingly the said W. C. Langley & Co. did, on the same day, place in the hands of Alonzo J. White & Son, brokers and auctioneers of Charleston, for sale, the whole of the property embraced in the two mortgages, which is situated in the city of Charleston; that the said
property, after 30 days' advertisement, is to be sold by the said
101 brokers on Thursday, the 23d day of April inst., at 11 o'clock; "conditions: one-fourth cash, balance payable in one, two, and three years, with interest from day of sale, payable annually, secured by bonds of the purchasers and mortgage of the property sold; buildings to be kept insured and policies assigned; purchasers to pay for all requisite papers & stamps," as will appear by the advertisement, a copy of which is herewith filed.

The said W. C. Langley & Co. are taking the steps necessary to enable them to have the balance of the mortgaged property in Columbia and Florida sold as soon as practicable.

At the request of the solicitors in the cause, I recommend that the sale of the mortgaged property advertised to be made by A. J. White & Son, on the 23d of April inst., do proceed; and that the said W. C. Langley & Co. do also proceed to sell the remaining property embraced in these mortgages, in accordance with the powers reserved to them, and that they do account to the court for the proceeds of said sales received by them. I also recommend that at the sale of the 23d inst., and also at the subsequent sales to be made, *that* the mortgagees,
W. C. Langley & Co., have leave to bid upon the property.
102 Respectfully submitted.

JAMES TUPPER,
Special Referee.

22 APRIL, 1868.

And on the 22d day of April, A. D. 1868, came into court the solicitors in this cause, to wit, Pressley, Lord & Inglesby, Whaley, Mitchell & Clancy, M. L. Wilkins, and Ch. Richardson Miles, and after hearing the report of James Tupper, special referee, agreed upon the passage of the following order by the court; which order is in words and of the enor following:

Order.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

W. C. LANGLEY & Co.
vs.
HARVEY COGSWELL ET AL.

F. L. MARKEY & Co.
vs.
W. C. LANGLEY & Co. ET AL.

On hearing the report of James Tupper, esquire, the special referee, to whom the above causes were referred, filed this day, and with the consent of all the solicitors in the said causes, it is ordered
103 that the same be confirmed.

It is further ordered that the sale of the property embraced in the mortgages from Benjamin F. Evans and Harvey Cogswell and Benjamin Mordecai to W. C. Langley & Co., advertised to be made by Alonzo J. White & Son on the twenty-third of April inst., as stated in the said report, do proceed.

And it is further ordered that the said W. C. Langley & Co. do proceed to sell the rest of the property embraced in the said mortgages, in accordance with the powers and conditions contained in the said mortgages; and that the said W. C. Langley & Co. do account before James Tupper, esq., the special referee aforesaid, for the proceeds of said sales received by them, and that he report the same to this court.

And it is further ordered that at any and all of the sales made by direction of the said W. C. Langley & Co., of the property embraced in the said mortgages, the said W. C. Langley & Co., or any member of the said firm have leave to bid for any or all of the said property, and to purchase the same for their or his own benefit, they or he being the highest bidder for the same at the said sales.

And it is further ordered that the said Benjamin F. Evans, Har-
104 vey Cogswell, and Benjamin Mordecai do unite in the conveyances of the several pieces of property to the purchasers at said sales.

And it is further ordered that the parties have leave to come in at the foot of this decree and apply for any other orders that may be necessary.

GEO. S. BRYAN,
U. S. Judge Dist. So. Ca.

22d *April*, 1868.

We consent.

PRESSLEY, LORD & INGLESBY.
WHALEY, MITCHELL, & CLANCY.
M. L. WILKINS.
CH. RICHARDSON MILES.

And on the 12th day of January, A. D. 1870, came into court the said W. C. Langley & Co., by M. L. Wilkins, their solicitor, and, by consent of the other solicitors, obtained the following order; which order is in words and of the tenor following:

Order.

W. C. LANGLEY & Co.
vs.
HARVEY COGSWELL ET AL.

F. L. MARKEY & Co.
vs.
W. C. LANGLEY & Co.

On motion of M. L. Wilkins, with the consent of the other counsel in this cause, it is ordered that this case be referred to Charles H. Simonton, as special mdster, in place of and with the same
105 powers and authority as were had by James Tupper, esq., deceased.

GEO. S. BRYAN,
U. S. Judge Dist. of So. Ca.

12 JAN'Y, 1870.

And on the 28th day of March, A. D. 1870, came into court the said W. C. Langley, by Lesesne & Miles, his solicitors, and filed the following petition; which petition is in words and of the tenor following:

Petition.

UNITED STATES OF AMERICA,
South Carolina District:

In equity.

EX PARTE WILLIAM C. LANGLEY IN THE MATter of W. C. Langley & Co.
vs.
HARVEY COGSWELL ET AL.

AND

F. L. MARKEY & Co.
vs.
W. C. LANGLEY & Co. ET AL.

To the honorable judges of the circuit court:

The petition of William C. Langley, one of the parties in the two causes in which this petition is entitled, respectfully showeth:

106 That the following order was made by this honorable court in the causes aforesaid, on the twentieth day of March, A. D. 1868: "On hearing the pleadings in these cases, and with the consent of all the solicitors in the causes, it is ordered that the sale of the Kalmia Mills property embraced in the conveyance of the 10th May, 1867, to Harvey Cogswell, in trust, made by Wardlaw & Carew, auctioneers, on the 19th March inst., under the previous order of this court, to William C. Langley for one hundred and sixty thousand dollars, be, and the same is hereby, confirmed. And it is further ordered that the said Harvey Cogswell, trustee, do convey the said property absolutely and in fee-simple to the said William C. Langley, subject to the condition and proviso made in the previous order of this court, that forty thousand dollars of the credit

portion of the purchase-money be retained to stand in place of the property and subject to the liens and equities of the several parties, and subject to the further order of this court. And it is further ordered that the Kalmia Mills do join in the said conveyance to William C. Langley, if required." That in accordance with the said order the said Harvey Cogswell, trustee, and the said Kalmia Mills did convey the said property to your petitioner in fee-simple, but subject to the charge, condition, and proviso contained in the order before recited, to re-
107 tain the sum of forty thousand dollars, parcel of the purchase-money, subject to the further order of the said court, to pay the same into the said court whenever ordered and required so to do, and subject to the said charge and condition then in trust to and for such uses and trusts, intents and purposes, and to and for such persons and in such shares and estates and proportions as your petitioner shall by deed declare, limit, and appoint.

And your petitioner further shows, that by an order of this honorable court, made on the day , A. D. 1870, the said causes were referred to C. H. Simonton, esq., as special referee to enquire into and report upon the facts stated in the pleadings and upon the several rights and equities of the respective parties, and that references have been held and arguments made before the said referee, who, your petitioner is informed and believes, will before long make a report to this honorable court upon the matters and things so referred to him.

And your petitioner further shows unto your honor, that he has contracted to sell and convey the entire property constituting the Kalmia Mills, so purchased by and conveyed to him as aforesaid, to the "Langley Manufacturing Company," a body politic and corporate by and under the laws of the State of South Carolia, but that your petitioner is unable to give a clear and unincumbered title to said property,
108 such as is expected and required of him by the purchaser, because of the charge, lien, and incumbrance which exists upon the said property in his hands by reason of virtue of the orders and decree of this court hereinbefore recited.

And your petitioner further shows, that it is of great importance and necessity that the said sale shall be immediately consummated, in order that the said Langley Company may at once commence work upon the said property, which is an incomplete state; that to delay the sale until the questions of lien and priority which arise in the said causes pending in this court can be finally determined would be to defeat it entirely, and to prevent the completion of a great and useful enterprise; that many of the questions originally raised in the said causes have been disposed of by the sales of the mill property and of the individual property sold under mortgages held by the firm of which your petitioner is a member, under the orders of this court, and by the evidence adduced in the progress of the said causes. And your petitioner is advised that some other security, and for a considerably less amount than is provided in the orders of this court, can now be substituted, and the land conveyed to your petitioner freed and discharged in the hands of the purchaser of all liens and incumbrances created by said orders, with-
109 out impairing the full, complete, and adequate security to which the parties to the said causes are entitled pending the litigation and determination of the said causes.

Wherefore your petitioner prays that it may be referred to the said C. H. Simonton, special referee, to inquire into the facts herein stated and to report to this honorable court whether other security may not be substituted for the charge upon the said property created by the previous

orders of this court, so that the said land and property may be sold and conveyed to your petitioner freed and discharged from all charge, lien, and incumbrance on the same created by said orders, without diminishing or impairing the rights and securities of the creditors of the Kalmia Mills, and all the parties to the said cause, and that he report what in his judgment will be sufficient security to be taken for this purpose, and in what form and amount such security shall be taken.

And your petitioner will ever pray, and so forth.

W. C. LANGLEY.

And on the 28th day of March, A. D. 1870, came into court the said W. C. Langley, by Lesesne & Miles, his solicitors, and by consent of the other solicitors obtained the following order; which order is in words and of the tenor following:

Order.

110 UNITED STATES OF AMERICA,
South Carolina District:

In equity.

EX PARTE, WILLIAM C. LANGLEY IN THE matter of W. C. Langley & Co.
vs.
HARVEY COGSWELL, ET AL.
F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO. ET AL.

On hearing the petition of William C. Langley, one of the parties in these causes, on motion of Lesesne & Miles, solicitors for the petitioner, it is ordered that it be referred to C. H. Simonton, esq., the special referee to whom the said causes were referred by the previous order of this court, to enquire into and report upon the facts therein stated, and whether the prayer of the said petition may be granted without prejudice to the rights of the parties to the said causes, with leave to report any special matter.

GEO. S. BRYAN,
U. S. Judge, Dist. So. Ca.

28TH MARCH, 1870.

We consent.

PRESSLEY, LORD & INGLESBY,
WHALEY, MITCHELL & CLANCEY.

111 And on the 28th day March, A. D. 1870, came into court the said Charles H. Simonton, special referee, and filed his report; which report is in words and of the tenor following:

Report.

UNITED STATES OF AMERICA,
South Carolina District:

EX PARTE W. C. LANGLEY, IN THE MATTER of W. C. Langley & Co.
vs.
HARVEY COGSWELL ET AL.
F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO.

Report of Charles H. Simonton, special referee.

To the honorable the judges of the United States court for the said district:

This case was referred to me to enquire into the facts therein set forth, and to report thereon, with leave to report any special matter.

I respectfully report that by an order of this court made in the main causes above stated, on 20th March, 1868, the Kalmia Mills prop-
112 erty, consisting of a valuable mill-site and buildings, in this State, was conveyed to the petitioners, subject to the condition that forty thousand dollars of the credit portion of the purchase-money be retained, to stand in place of the property, and subject to the liens and equities of the several parties, and subject to the further order of this court.

That by the operation of the said order the said lands are charged with the payment of the said sum of money, and to this extent there is a subsisting lien and encumbrance thereon. That lately a new company has been formed, and an agreement made for the conveyance by the petitioner to the said new company of all this property. And that the existence of this encumbrance constitutes an important obstruction in the way of the completion of said contract of sale.

It is proposed to substitute other security in lieu of the said charge, and I am directed to enquire as to the amount and nature of the security to be given.

The enterprise of the Langley Manufacturing Company, as the new company is named, is one of great importance to the public as well as to the individuals engaged in it. And unless some imperative necessity exists, or some danger of irremediable injury to the parties, it
113 would seem that this court would modify any of its orders which might stand in the way of an enterprise which promises to open a new field of labor for our State.

The main cases have been referred to me, and a full argument upon the questions involved has been made by the able counsel engaged therein. The report is in course of preparation, but is not yet prepared.

I respectfully recommend that W. C. Langley, the petitioner, be required to enter into bond to the clerk of this court, his successors in office or assigns, in the penal sum of forty thousand dollars, with two or more personal sureties resident in this State, to be approved by the solicitors in the cause and referee, or such other security, personal or collateral, as shall be agreed upon between said solicitors and said referee, the conditions whereof shall be that he will pay or cause to be paid into this court such sum or sums of money as he may at any time hereafter be directed to pay into court by an order to be made in these causes, or

in any of them, within ten days after the date of such order; and that when he shall have executed said bond, with such security, and has deposited the same with the clerk of this court, and shall obtain the receipt of the said clerk for the same, the previous order of this court be so modified that the lands therein ordered to be conveyed to
114 him, the said William C. Langley, shall be freed and discharged from the condition, lien, charge, and encumbrance now existing or charged upon the said lands and property under and by virtue of the said orders of this court and the *and the* conveyance of the said Harvey Cogswell and the Kalmia Mills to the said William C. Langley, in pursuance of the said orders, bearing date the nineteenth day of March, A. D. 1868.

28th Mch., 1870.

CHARLES H. SIMONTON.

And on the 28th day of March, A. D. 1870, came into court the solicitors in this cause, to wit, Lesesne & Miles, Pressley, Lord & Inglesby, and Whaley, Mitchell & Clancey, and after hearing the report of Charles H. Simonton, special referee, agreed upon the passage of the following order by the court; which order is in the words and of the tenor following:

Order.

UNITED STATES OF AMERICA,
Fourth Circuit:

In equity.

EX PARTE WILLIAM C. LANGLEY, IN THE MATTER OF W. C. LANGLEY & CO.
vs.
HARVEY COGSWELL ET AL.

AND *and*

F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO.

On hearing the report of C. H. Simonton, esq., the special referee, upon the petition of William C. Langley in the above causes, on motion of Lesesne & Miles, solicitors for the petitioner, and with the consent of all the solicitors in the causes, it is ordered that the same be confirmed.

It is further ordered and decreed that the said William C. Langley do enter into bond to the clerk of this court, with such security as shall be approved by the solicitors in the causes and the special referee, in the penal sum of forty thousand dollars, conditioned for the payment into this court of such sum or sums of money as he may at any time hereafter be directed to pay into court by any order to be made in these causes, or any of them, within ten days after the date of such order.

And it is further ordered that when the said William C. Langley shall have executed the said bond, with such security, and has deposited the same with the clerk of this court, and shall have obtained the receipt of the said clerk for the same, *that* the previous orders of this court in these causes be so modified that the lands and property

116 therein ordered to be conveyed to the said William C. Langley shall be freed and discharged from the condition, lien, charge, and encumbrance now existing and charged upon the said land and property by virtue of the said orders of this court and the conveyance of the said Harvey Cogswell and the Kalmia Mills to the said William C. Langley, made in pursuance of the said orders and bearing date the nineteenth day of March, A. D. 1868.

GEO. S. BRYAN,
U. S. Judge Dist. of S. C.

28TH MARCH, 1870.

We consent.

PRESSLEY, LORD & INGLESBY.
WHALEY, MITCHELL & CLANCEY.

Received, Charleston, 28th March, 1870, of William C. Langley, his bond to me as clerk of the circuit court, with Edwin Bates and F. J. Pelzer as sureties, in the penal sum of forty thousand dollars, executed and approved in accordance with the preceeding order.

DANL. HORLBECK,
C. C. C. U. S. for S. C.

And on the 28th day of March, A. D. 1870, came into court the solicitors in this cause, to wit, Pressley, Lord & Inglesby, Whaley, Mitchell & Clancey, and Lesesne & Miles, and agreed upon the passage
117 of the following order by the court; which order is in words and of the tenor following:

Order.

UNITED STATES OF AMERICA,
South Carolina District:

In equity.

EX PARTE WILLIAM C. LANGLEY, IN THE MATter of W. C. Langley & Co.
vs.
HARVEY COGSWELL ET AL.
AND

F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO. ET AL.

It being shown to the court that the said William C. Langley has, in compliance with the previous order of this court, executed and deposited with the clerk of this court his bond to the said clerk with two sureties, approved by the solicitors in the causes and the special referee, in the penal sum of forty thousand dollars, conditioned for the payment by the said William C. Langley into this court of such sum or sums of money as he may at any time hereafter be directed to pay into court by any order to be made in these causes, or any of them, within ten days after the date of such order, it is ordered and decreed
118 that the lands in Edgefield County, South Carolina, and other property formerly belonging to the Kalmia Mills, sold and con

veyed to the said William C. Langley by the said Harvey Cogswell and the Kalmia Mills, by deed bearing date the nineteenth day of March, A. D. 1868, in accordance with the previous orders of this court in the above causes, be, and the same are hereby, discharged from all condition, proviso, lien, charge, and incumbrance upon the same created by or arising out of the previous orders of this court and the conveyance aforesaid; and the said orders of this court are hereby altered and modified accordingly; and the said bonds of the said William C. Langley shall stand in place of the said land and property so discharged, subject to the rights and equities of the several parties to the said causes and the further order of this court.

And it is further ordered that a copy of this order be endorsed upon the conveyance to W. C. Langley aforesaid on the record thereof in the mesne conveyance office, Edgefield.

GEO. S. BRYAN,
U. S. Judge Dist. S. C.

28TH MARCH, 1870.

We consent.

PRESSLEY, LORD & INGLESBY.
WHALEY, MITCHELL & CHANCEY.
LESESNE & MILES.

And on the 1st day of November, A. D. 1870, came into court the said Charles H. Simonton, special referee, and filed his report; which report is in words and of the tenor following:

Report.

119 UNITED STATES OF AMERICA,
District of South Carolina:

In equity.

W. C. LANGLEY & CO.
vs.
HARVEY COGSWELL ET AL.

F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO. ET AL.

To the honorable the justices of the circuit court of the United States, sitting for the district of South Carolina:

Report of Charles H. Simonton, special referee.

These cases, being a bill and cross bill and the answers thereto, were referred to me under the order of this court of date 12th of January, 1870, as special referee in place of and with the same powers and authority as were had by James Tupper, esq., deceased, who had been appointed the referee under the order of date 20th March, 1868. This last-named order directed Mr. Tupper to inquire into and report upon the facts stated in the pleadings and the several questions and equities therein
120 raised, with leave to report any special matter. I respectfully report that I have been attended by the solicitors in the cause and have taken testimony.

The various questions of law and of fact which arise in the cases have been argued very ably and elaborately before me, and, after careful examination and consideration, I have reached the conclusions hereinafter stated.

The "Kalmia Mills," a corporation created for manufacturing purposes, executed on the 31st day of July, A. D. 1866, to W. C. Langley & Co. a mortgage of a large tract of land in Edgefield District, containing four thousand two hundred and fifty-nine (4,259) acres, purchased in part from Gustavus Volger, and in part from one John J. Glover; all of which several tracts of land were then in the possession of and occupied by the said Kalmia Mills as the site of their factory, then in course of erection, together with all and singular the waters, water privileges, rights, members, hereditaments, and appurtenances to the said premises belonging or in anywise incident or appertaining; also all the buildings, machinery, tools, implements, horses, mules, carts, bricks, lumber, and materials belonging to the said The Kalmia Mills, on the land and elsewhere. This mortgage was intended to secure two notes of the said Kalmia Mills, endorsed by B. F. Evans, B. Mordecai, and Harvey Cogswell, to said Langley and Co., dated June 23d, 1866, and payable February 1st, 1867—the one for $150,000, the other for $3,750. The mortgage contained the following covenant:

"That if default should happen to be made in payment of the said notes, *that* it should not be necsssary for the mortgagees to apply
121 either to a court of law or equity for the purposes of foreclosing the said mortgage, but upon such default of payment of either principal or interest the mortgagees should have full power and authority to put the mortgaged premises into the hands of some good broker and auctioneer, to be sold for cash or credit, at the option and direction of the mortgagees, at public sale, to the highest bidder, according to the custom of vendue, after thirty days' advertisement of the time and place of sale in any one of the newspapers in the city of Charleston, and any one in the city of New York, the mortgagees returning the overplus, if any should happen to be, from the net proceeds of such sale, all the expenses being first deducted, after paying themselves the amount due upon the said notes, to the said The Kalmia Mills."

A second mortgage was made of the same property and in the same terms on the 10th October, 1866, to secure two other notes drawn by said Kalmia Mills and endorsed by the same parties, payable February 1st, 1867—one for $30,000, the other for $750.

Default was made in payment of all these notes, and on the 16th March, 1867, Langley & Co. placed the mortgages in the hands of Wardlaw & Carew, brokers in Charleston, and, under the powers conferred in the said deeds, advertised the property for sale on the 23d April, 1867. At this time there were sundry other creditors of the Kalmia Mills, among these Markey & Co., who were the contractors and builders engaged in putting up the factory buildings, workshops, cottages, &c. These persons had entered into a formal contract in writing with the Kalmia Mills Company of a date anterior to the mortgages to
122 Langley & Co., but which, not being recorded as provided in A. A. 1816, at the time these mortgages were executed, constituted no lien on the buildings. It was recorded on the 17th day of April, 1867, a few days before the sale, and thenceforward, under the operation of the act aforementioned, created a lien upon the buildings erected by them from the date of said record, subject to existing liens. (6 Statutes at Large of So. Ca., 32.)

Another creditor to whom it is necessary to call attention was Gus-

tavus Volger. A part of the land upon which the Kalmia Mills were erected, and which was mortgaged to Langley & Co., was purchased from Volger. At the date of the purchase Volger and his wife were absent in Europe, and the deed was executed by his attorney in fact. Owing to the absence of Mrs. Volger, her renunciation of dower could not be taken. It was therefore agreed that one-half of the purchase-money be paid in cash and that the other half be retained until the dower was renounced. No mortgage was taken, as the terms of sale were cash. The half of the purchase-money thus retained had not been paid at the time of the proposed sale.

The other creditors were generally for small amounts, and need no special mention.

As soon as the advertisement of Langley & Co. appeared, the two creditors above named consulted counsel and began to take measures to secure their interests.

Markey & Co. prepared a bill praying an injunction upon the sale, but before it was filed their solicitors had a conference with the solicitor of Langley & Co. In that conference the solicitor for the mortgagees
123 announced that Evans, Mordecai, and Cogswell intended to become the purchasers of the whole property at a price sufficient to pay all the debts of the Kalmia Mills Company; that to this end they had formed an estate of the debts other than those held by Langley & Co., and had estimated them at twenty thousand ($20,000) dollars; that they intended to bid at the sale $20,000 beyond the Langley debt, and out of this surplus expected to pay every one; that they were prompted to this course as well by motives of expediency as by motives of principle. The counsel of Markey & Co. expressed complete satisfaction with the course thus indicated, and relinquished their purpose of filing a bill. As an additional consideration, Evans, Cogswell, and Mordecai guaranteed in writing that in case they became the purchasers of the property they would complete the contract for the buildings, &c., made between the Kalmia Mills Company and Markey & Co.

Volger also threatened suit to establish his equitable lien and to enforce the performance of his contract. Before the sale, however, an arrangement was made by which Evans, Mordecai, and Cogswell guaranteed this claim of Volger, and his suit was abandoned. All other creditors were notified of this arrangement, and either acquiesced or expressed no dissent therefrom. All obstacles to the sale being thus removed, it took place. In the first advertisement of the sale it was stated as follows: "Terms, which will be accommodating, will be made known in a future advertisement and on day of sale." In the subsequent advertisement the terms were declared to be one-third cash, remainder on notes at six, nine, and twelve months, secured by mortgage of the property.
124 At the sale the auctioneers announced the terms, and added that they were authorized to announce that "the purchasers will be able to negotiate more favorable terms with the sellers, provided it is to their mutual interests." At this sale the property was put up at the amount of the debt to W. C. Langley & Co. Harvey Cogswell bid $20,000 over and above that amount, and it was knocked down to him. He announced that the bid was made by him "for and on behalf of himself and of Evans and Mordecai, and such other persons as should contribute to the purchase-money and come in and unite with them in the formation of a new company for the purpose of carrying out the contemplated enterprise."

The amount of his bid, as above stated, was twenty thousand dollars over the amount due to Langley & Co. After the sale Langley & Co.

entered into a written agreement with Cogswell, Evans, and Mordecai, (a copy of which is appended to this report as Exhibit A,) in which it is recited that inasmuch as the purchasers are unable to comply with the terms of sale as advertised, by paying one-third cash, that they, in pursuance of their power, agreed to accept from them their notes for the entire amount of the purchase-money bid by them, the notes for their debt payable in five, six, and seven months, and the note for $20,000 payable in twelve months, upon condition that the parties entered into a bond of indemnity to them in the penal sum of $100,000, secured by mortgage of certain individual property specified, conditioned for the payment of all of the notes given for the purchase-money. This agreement was carried out, and Langley & Co. received three notes for $4,779.02 each, payable at five, six, and seven months, with seven per cent.
125 interest, one note for one hundred and eighty thousand ($180,000) dollars, payable 12th January, 1868, and one note for twenty thousand dollars, payable 23d April, 1868. Of these, the notes for $4,779.02 and the note for $180,000 covered the mortgage debt to Langley & Co. The note for $20,000 was intended to cover the other creditors, including Markey & Co., and was supposod to be ample for this purpose.

In pursuance of this agreement, Evans, Mordecai, and Cogswell gave to Langley & Co. a bond for one hundred thousand dollars, as an indemnity to them against any loss arising therefrom, (a copy of this bond accompanies this report as Exhibit B,) and to secure said bond mortgaged a large amount of real estate standing in their several names.

Notice of the willingness of Langley & Co., to modify the terms of sale was given openly at the sale, but the modifications above stated were made without consultation with and, as far as the evidence shows, without the knowledge of the other creditors.

The sale having been affected, Langley & Co., in the exercise of the powers conferred upon them in the mortgages which they held, on 10th May, 1867, executed a conveyance in fee-simple to Harvey Cogswell of the entire property covered by the mortgages upon the following trusts:

"In trust, nevertheless, to, for, and upon the following uses and trusts, and subject to the following powers, provisoes, and conditions, that is to say, *in trust* out of and from the said purchase-money to pay first the costs and expenses of the said sale, then to pay the following promissory notes under the hands and seals of the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, bearing date the same
126 day as these presents given for the credit portion of the purchase-money, viz: Three notes for the sum of four thousand seven hundred and seventy-nine $\frac{02}{100}$ dollars each, payable, five, six, and seven months respectively, after date, to the order of W. C. Langley & Co., at the First National Bank of Charleston, with interest from date at the rate of seven per cent. per annum; one note for the sum of one hundred and eighty thousand ($180,000) dollars, payable on the twelfth day of January, A. D. 1868, to the order of the said W. C. Langley & Co., at the First National Bank of Charleston, with interest from date at the rate of seven per cent. per annum; and one note for the sum of twenty thousand ($20,000) dollars, payable on the twenty-third day of April, A. D. 1868, to the order of the said William C. Langley & Co., at the same bank, with interest from date at the rate of seven per cent. per annum, as by reference to the said notes, copies of which are hereon endorsed, will more fully appear; and subject to the trusts for the payment of the entire amount of the purchase-money as aforesaid to and for such uses and trusts, intents and purposes, and to and for such person or persons,

and in such shares, estates, and proportions, as they the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai shall by any deed or deeds under their hands and seals, executed in the presence of two credible witnesses, from time to time or at any time, declare, limit, and appoint.

The deed contained a proviso that in case of default of payment "to the said Langley & Co. of the principal or interest of the said promissory notes given for the purchase-money aforesaid, or of any or either of them respectively, or any part thereof, at the times appointed
127 for the payment of the same respectively," they could sell the mortgaged property without application to any court, &c.

The notes, having been executed, were delivered to Langley & Co., who retained all but the $20,000 note, which was intended to cover the claims of the other creditors. This note they transferred to the Kalmia Mills Company, and delivered it to B. F. Evans, as its president, to be held by him for the benefit of the said creditors of that company.

The notes held by them not having been paid, Langley & Co. again proceeded to advertise the mortgaged property for sale. Opposition was made by Markey & Co., and perhaps others, and proceedings in the State courts were threatened. The bill was filed in this court by Langley & Co., setting up their rights, and praying injunction against proceedings on the part of creditors to stop the sale. The answers were filed by Markey & Co., and by Goodrich, Wineman & Co., who were made defendants, as representing various classes of creditors, and soon after the cross-bill was filed by Markey & Co. While these cases were under consideration, and before the argument was concluded, the day of sale arrived, and an order was made by consent that the sale by W. C. Langley & Co. should proceed, "provided that the said property at said sale be not sold for a sum less than one hundred and sixty thousand dollars, and that forty thousand dollars of the credit portion of the purchase-money be retained to stand in place of the property, and subject to the liens and equities of the several parties, and subject to the further order of
128 the court." W. C. Langley became the purchaser, and the sale was confirmed by the order of the court, with the same condition and proviso as to $40,000.

The property brought at this second sale one hundred and sixty thousand ($160,000) dollars. These are the main facts set out in the pleadings. It appears in evidence that after the sale in 1867, Cogswell, Evans, and Mordecai, who carried on the enterprise, paid off several debts.

They paid the notes which they had given for the Volger debt, $7,322.25. They discharged several smaller debts due operatives and other parties, to the amount of $9,351.96, and paid dollars on account of the amount due Markey & Co., leaving a balance due them of eleven thousand nine hundred and fifty-nine $\frac{70}{100}$ ($11,959.70) dollars. They have credited these payments on the $20,000 note, the amount of which had been made up by including the debts thus paid, and it is claimed that the payments should go towards the extinguishment of the note. If this be allowed, there will remain as a balance of principal on this note some thirty-three hundred and twenty-five $\frac{79}{100}$ ($3,325.79) dollars. The result has proved that the claims against the Kalmia Mills, not included in that held by Langley & Co., greatly exceeded twenty thousand dollars, being in fact about dollars.

At the second sale, as has been stated, the mortgaged property brought about one hundred and sixty thousand dollars. By the subsequent order of this court, made with the consent of all parties, Langley & Co. then proceeded to enforce their liens upon the property mortgaged to

secure the bond of indemnity for one hundred thousand dollars
129 given them by Evans, Cogswell, and Mordecai. The sales have been nearly completed, and have realized some dollars.

A statement of the sales and of the present condition of the assets is appended to this report. Benjamin F. Evans, Harvey Cogswell, and Benjamin Mordecai have all been adjudicated bankrupts since these proceedings began. These are the facts of these cases, which seem to me to be material for the purposes of this report. I also append the evidence.

Four questions are presented for adjudication.

First. What effect was produced on the rights of the parties by the modification, on the part of Langley & Co., of the terms of sale in 1867?

The creditors who are interested in the note of $20,000 contend that, had the terms of sale as advertised been carried out, one third of the bid would have been paid in cash, and the whole property would have been mortgaged to secure the remainder of the purchase-money, which would have been ample security; that the property, having been sold in 1867 for $210,000, brought in 1868 $160,000; and that, if Langley & Co. had not burdened it with the payment of the cash portion, $75,000, there would have been quite enough to pay in full the credit portion, in which their $20,000 note was included. They insist, therefore, that Langley & Co. must bear this loss, especially as the modification of the terms of sale was made without their knowledge or consent, and as Langley & Co. demanded and received indemnity for the modification.

Langley & Co. insist upon their right, under the mortgage and the terms announced at the sale, to give the extension of the cash portion.

130 Second. The second question is as to the relative rank of the $20,000 note and the notes retained by Langley & Co., which together made up the purchase-money at the sale in April, 1867.

Langley & Co. insist that as this sale was made by them under their prior lien, by virtue of powers contained in the deed securing this lien, and made for the purpose of paying off the lien, they are absolutely entitled to priority in payment out of the proceeds of the sale, and that no other debt was intended to be paid, no other debt can be paid out of the proceeds of sale until their claim is fully satisfied.

The creditors interested in the $20,000 note contend that all pre-existing liens are extinguished by the sale; that none of the securities taken for the purchase-money have any priority over the others, except such as is given by the trust-deed securing them, (the deed to Cogswell, trustee,) and that this deed makes no distinction between the notes provided for the debt due Langley & Co. and that for $20,000 provided for the claims of outstanding creditors; that the last, therefore, must stand on the same footing and must be paid pari passu with the Langley notes.

Third. The third question is as to the distribution of the proceeds of this note for $20,000. Are all creditors equally interested therein, and entitled to a distribution pro rata of the money derived therefrom, or have the Kalmia Mills Company, or Cogswell, trustee, the right to pay such of the creditors as they may select, and credit the amounts thus paid on the note?

Fourth. A fourth question was made at the argument respecting the right of Markey & Co. under their lien.

131 It was contended that they had right to priority of payment over all the creditors except Langley & Co., and that the proceeds

of this note for $20,000 should first be applied in extinguishment of their debt.

I will examine these questions in inverse order; and as the fourth question is somewhat connected with, and is governed by the same principle as controls the second, I pass on to the discussion of that which I have called the third—that in which is involved the distribution of the proceeds of the note for $20,000.

When the sale of 1867 was about to take place, Evans, Cogswell, and Mordecai, anxious to preserve the reputation of the enterprise in which they were engaged, and feeling sensibly the claims of all their creditors, determined that if it were possible no one should lose anything who had aided the enterprise with credit. They resolved, therefore, to make the property bring a sum which, with the other assets, would suffice for the payment of their entire debt, and, in an estimate intended to be complete, they put down the sum of the claims of all the creditors besides Langley & Co. at $20,000. This was supposed and intended to include every claim. They carried out their resolution, and a note for $20,000, a part of the purchase-money, was dedicated to the payment of these claims. In this note, therefore, each creditor had an interest, and the leading creditors had notice of and acquiesced in it. (See Tennant vs. Stoney, 1 Rich. Eq., 230.)

It became a fund sacred for a particular purpose, and no one was authorized, without the consent of all parties in interest, to change the purpose. When Evans, as president of the Kalmia Mills Company, accepted the custody of the note, he received it with notice of
132 this purpose, and it became his duty so to administer all funds derived from it as to give each creditor the benefit of them. As all were interested, no one could receive more than his proper proportion. If the note was sufficient to cover all the claims, each would be paid in full. If the note was insufficient for this purpose, each could only get his pro-rata share therein.

It is said, however, that Cogswell was the debtor on this note, and that the Kalmia Mills Company, to whom, or to whose president, the note was transferred, was the creditor, and that as debtor Cogswell could direct the application of all payments made by him, and that if he failed to do so, the Kalmia Mills Company could make such direction; that in fact this was done when the payments made by them were credited on the note. (Jones vs. Kilgore, 2 Rich. Eq., 53.)

But Cogswell was debtor not to these creditors, but on the note, the funds in which all the creditors had an interest, it is true, but the consideration whereof was the purchase of land, and the Kalmia Mills Company, or rather Evans, the president of the company, was the trustee, holding the funds. Cogswell was legally bound to make good the note, and thus to furnish the fund. President Evans was equally bound in equity to distribute the funds when received according to the purposes of its dedication. It is not pretended that Harvey Cogswell, trustee, was debtor as such trustee to the general creditors, except in so far as they owned the note given by him, and which had been set apart for their benefit; and it is not pretended that Evans, president, or the Kalmia Mills Company, were his creditors, except in so far as they held in trust his note, which belonged to the general creditors. Could the Kalmia
133 Mills Company have used the money paid on the note in any mere adventure? Could they have used it in any other investment? Could they have lawfully applied the note to the payment of any other than the general creditors existing at the time of sale? They could not; because at that very time the note had been set apart by

debtor and creditors, and all persons interested, for the benefit of all the creditors then outstanding. Again, among the debts paid, and which it is claimed should be a credit on this note, is a debt created to pay Volger his claim. This debt was paid by the note of Evans, Mordecai, & Cogswell, the parties interested in the Kalmia Mills Company, the real makers of the note of Harvey Cogswell, trustee, and one of them, Evans, the custodian of the $20,000 note which had been set apart for creditors.

Have they the right to make a payment by which they would release themselves from liability incurred and immediately thereupon re-imburse themselves by obtaining a preference in a fund dedicated by themselves for the benefit of all the creditors of this company, by which dedication they had been enabled to stop all threatened suits, and to start their new enterprise without interruption?

I am of the opinion that they could not.

Second. What is the relative rank of the note for $20,000, and of the notes retained by Langley & Co., which were received in the purchase-money under the terms of the sale in April, 1867?

Langley & Co. not only had the oldest lien, but the only lien on the whole property of the Kalmia Mills Company. Their claim was secured by a mortgage, which contained a power to sell for cash or credit
134 for the purpose of satisfying this claim. The rights of all other creditors were subject to the mortgage and to the powers therein contained up to the hour of the sale. Therefore they had an unquestionable right to be re-imbursed out of the proceeds of the sale about to take place, and to exhaust such sales, if need be, in payment of their debt. What, then, was the effect of the sale?

It is said that the sale extinguished all existing liens. This is true in a certain sense. So far as the purchaser at the sale is concerned, all liens upon the property sold, created by or subsequent to the mortgage, were extinguished. He took a clear title. (Schmidt vs. Gatewood, 2 Rich. Eq., 174.) But so far as the proceeds of sale are concerned, and so far as these proceeds are to be distributed, the liens are not extinguished. They are transferred to the fund.

The law in South Carolina on the subject of mortgages of realty differs essentially from the English law. The mortgage itself conveys no interest, creates no title in the land mortgaged. It is never a conveyance of the fee; it is only an incumbrance on the title. (See A. A. 1791, 5 Stat. 169; A. A. 1797, 5, Stat. 34; Mitchell vs. Bogan, 11 Rich. Law, 704; Thayer vs. Cramer, 1 McC. Ch., 395.)

All that is given to the mortgagee is the right to demand the payment of the mortgage debt, or the sale of the mortgaged premises to effect this payment. The only use which the mortgagee can make of his mortgage is as a means of compulsion for the sale of the mortgaged premises and the application of the proceeds of sale to his debt. His claim, then, is really against the proceeds of sale, and his rights
135 therein become absolute and fixed. The sale by Langley & Co. therefore did not affect their claim for priority. They had a clear right to apply the proceeds of sale to the payment of the amount due to them by the Kalmia Mills Company. The power of sale was given to secure this, and the sale was made in order to effect it.

Did Langley & Co., before or at or after the sale, do any act by which they waived this right? It does not appear that there was any reason for believing that the property was not worth much more than all the claims against it. The evidence does not cast a suspicion that Langley & Co. before the sale made any agreement that creditors subsequent to

them should be put upon the same footing with themselves. Two creditors, Markey & Co. and Volger, threatened to interfere with their sale under the mortgage. Markey & Co. were informed of the intention of Evans, Mordecai, and Cogswell to make the property bring enough to cover Langley's debt and all other debts; that is, enough to pay off Langley & Co. in full and to have a surplus for distribution. They at once acquiesced. I do not understand that any contract was made with Langley & Co. that these debts of the other creditors should be paid. Mordecai, Evans, and Cogswell announced this to be their intention, and these only guaranteed its performance to Markey & Co. Volger made threats of proceedings, but was pacified by a written guaranty of these three persons.

At the sale the announcement was made that the property was sold under the power contained in and for the purposes of the mortgage.

These were intended to facilitate the payment in full of the mort-
136 gage debt due to Langley & Co. The powers conferred on Langley & Co. in the mortgage-deed made them trustees, but their duties as such trustees were to advertise the sale in a certain way; to see that the sale was fairly and openly conducted according to the custom of vendue; that it should be for cash or credit, at their option and direction; that they should pay themselves the amount due upon the notes secured by the mortgage from the net proceeds of sale; and that they should account for the overplus, if any there should be.

Was any act done after the sale by which they surrendered their right of priority?

When the sale was completed, Langley & Co. executed a conveyance of the whole of the property included in the mortgage to Harvey Cogswell, trustee, upon the following trusts:

"In trust, nevertheless, to, for, and upon the following uses and trusts, and subject to the following powers, provisoes, and conditions, that is to say, in trust, out of and from the said purchase-money, to pay first the costs and expenses of the said sale, then to pay the following promissory notes, under the hands and seals of the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, bearing date the same day as these presents, given for the credit portion of the purchase-money, viz: Three notes for the sum of four thousand seven hundred and seventy-nine 2-100 dollars, each payable five, six, and seven months respectively after date, to the order of Wm. C. Langley & Co., at the First National Bank of Charleston, with interest from date at the rate of

seven per cent. per annum; one note for the sum of one hundred
137 and eighty thousand ($180,000) dollars, payable on the twelfth day of January, A. D. 1868, to the order of the said Wm. C. Langley & Co., at the First National Bank of Charleston, with interest from date at the rate of seven per cent. per annum; and one note for the sum of twenty thousand ($20,000) dollars, payable on the twenty-third day of April, A. D. 1868, to the order of the said William C. Langley & Co., at the same bank, with interest from date at the rate of seven per cent. per annum, as by reference to the said notes, copies of which are hereon endorsed, will more fully appear, and subject to the trusts for the payment of the entire amount of the purchase-money as aforesaid, to and for such uses and trusts, intents, and purposes, and to and for such person or persons, and in such shares, estates, and proportions as they, the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, shall, by any deed or deeds, under their hands and seals, executed in the presence of two credible witnesses, from time to time, or at any time, declare, limit, and appoint."

It will be observed that by the words of this deed there are but three purposes declared in the trusts and they come in this order:

First. To pay the costs and expenses of the sale.*

Second. To pay "the following promissory notes," naming them
138 in order, according to the dates at which they respectively became due, and ending with the note for $20,000, but making no other distinction apparently.

Third. After paying the entire amount of the purchase-money, then to hold the remainder subject to such uses as should be declared, &c.

I confess that if this deed stood by itself, and if it were not read by the light of surrounding circumstances, I would have great difficulty in coming to any other conclusion than that the notes all stood on the same footing and must be paid pari passu.

Can we take these circumstances into consideration, and thus give construction to the deed? Story, in his Equity Jurisprudence, at § 152, says: "One of the most common classes of cases in which relief is sought in equity, on account of a mistake of facts, is that of written agreements, either executory or executed. Sometimes, by mistake, the written agreement contains less than the parties intended, sometimes it contains more, and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable controversy." See also § 155.

Mr. Miles, who was the solicitor both of Langley & Co. and
139 Cogswell, says that he was instructed to draw the deed so as to secure the priority of Langley & Co.; that they never had any intention of surrendering the priority, and that Cogswell, Evans, and Mordecai fully recognized and admitted their right.

After careful examination, I can discover no consideration or inducement leading Langley & Co. to any such surrender. If, then, the deed, by a technical construction of its words, surrenders this priority, it was drawn and executed in mistake, and, following the authority of Story, should be reformed in this respect. See also Hunt vs. Rousmaniere, 1 Peters, 13, and Laurence vs. Beaubien, 2 Bailey, 123.

Again, the sale made by Langley & Co. under the power of sale in the mortgage-deed should be considered as if made by a master in equity or any other executive officer of the court under a decree for foreclosure.

If this sale had been made under an order of court, and had been made for cash, it is clear that the debt of Langley & Co. should have been first paid, and when that was satisfied, the surplus would have gone to the mortgagor, the Kalmia Mills Company; and as the mortgagor had dedicated such surplus to the creditors outstanding at the day of sale, it would have been paid over to such creditors. If the sale had been made entirely on credit, and the notes had been left in the hands of the mas-

---

* These expenses are as follows:

First sale, in 1867	$841 94
Second sale, in 1868	557 79
	$1,399 83

ter, it would have been his duty to apply the proceeds as fast as collected towards the payment first of the debt of Langley & Co., and after this was paid to the other creditors. If the sale had been made partly for cash and partly on credit, and the credit portion had been kept
140 in court, the cash would have gone to Langley & Co.; and if any balance remained unpaid to them, the proceeds of the notes, as fast as collected, would be applied to the liquidation of their lien. There seems to be no difference of opinion on this point, and the practice of our late court of equity is as I have stated. If, however, the party holding the first lien prefers to take the notes or bonds taken for the credit portion out of the hands of the master and accepts them as so much cash, his lien on the fund is ended, and he must look to his notes or bonds only for payment. In other words, if he receives these notes or bonds as payment, and accepts them as such, they will be treated as payment.

Peters vs. Barnhill, 1 Hill's Law, 236, note a.

Now, did Langley & Co. do this?

They received the notes given for the purchase-money according to the modified terms of sale, kept those given for their own claims, and transferred to the custody of Evans, president of the Kalmia Mills Company, the note for $20,000 which was intended for the general creditors.

Did this amount to an absolute acceptance of these notes as payment and discharge their priority?

Now, the receiving a note or bill for a debt, even for an open account, is not payment, unless it be expressly accepted as such or produce payment.

Barelli vs. Brown & Moses, 1 McC., 449.

Boulware vs. Harrison, 4 Rich. Eq., 317.

Costello vs. Carr, 2 Hill Law, 528.

Bank vs. Bobo, 9 Rich. Law, 31.

141 Hext vs. Fraser, 2 Strobhart's Eq., 250.

In the present case Langley & Co., their solicitor, Messrs. Evans, Mordecai, and Cogswell, all state that they did not accept these notes as payment. The deed given by Langley & Co. to Cogswell is evidence to the same effect. It expressly declares that the conveyance to him of the property purchased by these notes was on the condition that the notes be paid. In other words, the purchase-money should not be considered as paid until the notes were paid, and out of this purchase-money only could the lien be satisfied.

At the most the delivery of the note for $20,000 to the president of the Kalmia Mills Company by Langley & Co. raises the presumption that they were satisfied with the notes and were willing to distribute the fund.

But this presumption is rebutted by all the circumstances of the case and by the positive evidence of the intention of the parties who made and who accepted the delivery. It is true that an attempt has been made to shew that Cogswell, trustee, made payments on this note for $20,000, and that an effort has been made to establish credit for such payments. And it has been argued by the counsel for Markey & Co. that such payments could not have been made unless the prior lien of Langley & Co. had been extinguished by the acceptance of the notes in satisfaction thereof.

But these payments by Cogswell on the note for $20,000, if they were in fact made, were made without the consent of Langley & Co., and, so far as the evidence goes, without their knowledge.

On the whole, I am of the opinion that the note for $20,000 does
142 not take rank pari passu with the rest of the credit portion of the purchase-money which were secured by the trust of the deed of Harvey Cogswell, trustee.

We come now to the discussion of the first of the questions above stated, and the most important in this cause.

The mortgages of July 31st and November 3d, 1866, empowered Langley & Co., upon default of payment of either principal or interest, "to put the mortgaged premises into the hands of some good broker and auctioneer, to be sold for cash or credit, at their option and direction, at public sale, to the highest bidder, according to the custom of vendue, after thirty days' advertisement of the time and place of sale in any one of the newspapers in the city of Charleston and any one in the city of New York, they returning to the Kalmia Mills the overplus, if any should happen to be, from the net proceeds of such sale, all expenses being first deducted, after paying themselves the amount of their debt."

On the 16th March, 1867, Langley & Co., in the exercise of this power, put the mortgaged property in the hands of Wardlaw & Carew, brokers and auctioneers, advertised the time and place of sale in one paper in New York and one in Charleston, stating that the terms of sale should be one-third cash; balance by notes at six, nine, and twelve months, secured by mortgage of the property. At the sale it was announced that more accommodating terms might be had by approved purchasers. After the sale to Evans, Mordecai, and Cogswell, the terms were changed to all credit, and the time of the notes was also changed, that of
143 $20,000 alone being twelve months, and for this change of terms the purchasers gave a bond of indemnity secured by mortgage to Langley & Co.

The whole doctrine of courts of equity on the subject of mortgages, and of the equity of redemption which remains in the mortgagor, is based upon the principle that mortgaged property should be made available, if possible, not only for the payment of the particular debt for which priority is secured, but also for the other debts of the mortgaged debtor. If the property mortgaged be worth more than the debt, the debtor in England could redeem it. In this State our courts go farther, and require a sale whereby the value of the property is fixed, and the surplus may be secured for distribution among creditors or for repayment to the mortgagor. The object of a judicial sale is to secure the highest price for the property, and therefore it is public, after full notice, and after the manner of auction upon terms fixed by the order of sale.

I apprehend that when parties seek to avoid the delay and costs of proceedings to enforce a sale and consent to make a decree for themselves, as is done in the deeds in this cause, they must, however, be held to the analogy of public sales under the order of the court. Langley & Co., under this deed, occupy the same position as the executive officer of the court in a sale under foreclosure. They had under their protection, first their own claim, then the rights of the mortgagors and the claims of the other creditors. It was their duty so to conduct the sale as to secure the largest possible price fixed by the sale.

Eden on Injunctions, p. 340, n. 2.

Ord vs. Newell, 5 Maddox Ch., 440.

144 When that was ascertained, they were empowered to make title and to receive and distribute the purchase-money. They had a power coupled with a trust, a power to sell, a trust to conduct the sale to the best advantage for all concerned, and to distribute the proceeds

according to the law of the deed. In this particular case the rights of third parties were called to their attention, an injunction against their proposed sale was threatened and withdrawn upon the promise that arrangements were made for securing their debts and the debts of the other creditors.

Pursuing their duty under the deeds, they put the property in the hands of very competent persons, and advertised in New York and Charleston the time, place, and terms of sale. At the sale the property brought about two hundred and ten thousand ($210,000) dollars, much more than enough to pay the whole mortgage-debt. By the published terms of sale this was payable one-third in cash, remainder in six, nine, and twelve months.

Evidently the creditors not named in the mortgage were entitled to look to the fund, bearing these proportions of cash and credit, as the source whence the whole debt, with a due regard to legal priority, should be paid. But according to the notice given at the hour of the sale, the terms after the sale were modified, and instead of the cash, an extended credit was given. From this modification loss has occurred. On whom should the loss fall? I am of the opinion that the notice given at the time of the sale was inoperative:

First. Because it was contrary to the advertised terms of sale.

145 Second. Because it tended to chill the bids and to put the whole sale under the absolute control of Langley & Co.; and

Third. Because it was an effort to make a sale at private sale after the sale at public auction had been completed.

Langley & Co. having advertised the terms as well as the time and place of sale, the public were induced to attend the sale under those terms, and every one present had the right to suppose that those terms would be imposed on every bidder. When those present heard that other persons, who might be approved by the vendor, could and would receive more favorable terms, they would have a right to complain that the equality, which is the essence of auction sales, was violated and they would be deterred from bidding by fear of partiality. The very object, therefore, of a public sale was thus defeated and the rights of all those who came after Langley & Co. were jeopardized and injured. Again, the title to this property was not in the Langleys. All that they had was a power to sell after a notice of a certain number of days, through a good broker and auctioneer, and at public auction. When this was done their power to sell was exhausted.

Thereafter they could only make title to the purchaser and receive the purchase-money. When the hammer of the auctioneer fell, so far as the sale was concerned, they were functi officio. In so far, however, as the interests of Langley & Co. alone were concerned, they could control these. When, therefore, they contracted to give more favorable terms to an approved purchaser, they could do so out of the proceeds of the purchase-money coming to them. And when, in pursuance of their contract, they actually did modify the terms, they must be con-

146 strued to have done so out of and at the risk of that portion of the purchase-money which was allotted to them. Indeed they seem to have been of the same opinion themselves, for upon making this modification they took a bond of indemnity to themselves. If they had made the modification of the terms of sale as agents of the mortgagor, (the position they occupied under the power of sale in the mortgage,) and as custodians of the interests of other creditors as well as of themselves, the bond of indemnity would have declared this. But it was personal to them, and was evidently intended to protect them and none other from the consequences of their own act.

Under this view of the case, the effect of the modification of the terms of the sale is the postponement of the $70,000, which should have been paid in cash, to the amount of one hundred and forty thousand ($140,000) dollars to be secured by notes, including the $20,000, provided for the general creditors.

At the second sale, the property brought one hundred and sixty thousand ($160,000) dollars, more than enough to pay the credit portion. As, therefore, forty thousand ($40,000) dollars has been reserved to meet the result in this case, I respectfully recommend that this sum be applied to the satisfaction of the amount due on the $20,000 note, and the remainder returned to Langley & Co.

It only remains that I should set out the names of the creditors, and the amounts and character of the claims held by them.

There are two classes of creditors:

First. Those claiming under lien.

147 Second. Those who have no lien, such as Goodrich, Wineman & Co., and others represented by them.

FIRST.

This first class contains Langley & Co., Markey & Co., and the claim which stood in the name of Gustavus Volger, the first two setting up legal liens, the last asserting an equitable lien.

a. Langley & Co. The original debt due by the Kalmia Mills to Langley & Co. was made up of the following notes:

Note 23d June, 1866, payable February 1st, 1867, interest from date @ 7 ℔ cent	$150,000 00
Note 28d June, 1866, payable February 1st, 1867, interest from date @ 7 ℔ cent	3,750 00
Note October 10th, 1866, payable February 1st, 1867, interest from date @ 7 ℔ cent	30,600 00
Note October 10th, 1866, payable February 1st, 1867, interest from date @ 7 ℔ cent	750 00
	$194,337
On the day of sale, 23d April, 1867, there was due to Langley & Co. on these notes	$194,337 07

148 Under the sale for foreclosure the mortgaged property brought $20,000 more than this sum, say $214,337.07.

And by the terms of sale one-third was payable in cash, say the sum of seventy-one thousand four hundred and forty-five $\frac{69}{100}$ dollars, and the sum of one hundred and forty-two thousand eight hundred and ninety-one $\frac{38}{100}$ dollars was payable in notes.

Of these, twenty thousand ($20,000) dollars belonged to the creditors other than Langley & Co. At the second sale, made under the order of this court by consent of the parties, the property brought one hundred and sixty thousand ($160,000) dollars. Langley & Co., instead of requiring one-third cash, consented that the sale should be on credit, and at the same time took from Evans, Mordecai and Cogswell a bond of indemnity for one hundred thousand ($100,000) dollars, secured by a mortgage of certain real estate. This has been sold for a gross sum of about fifty-two thousand (52,000) dollars, not including certain real estate in Columbia, which passed into the hands of the assignee in bankruptcy of Evans & Cogswell, bound by liens antecedent to their title, and which was sold for $8,900. The orders of the court show the condition of this fund.

If the views presented by the complainants, Langley & Co., be sustained, it is more than probable that the entire net proceeds of the sale of the mill-property and of the individual property sold under the mortgages will not entirely extinguish their debt, but there will still remain a balance due them, and no surplus will remain for payment of the other creditors.

149 If, however, the views presented in this report be sustained, then the assets will be marshalled as follows:

Proceeds of the first sale	$214,337 07
Of this, one-third being payable in cash	71,445 69
There would remain in notes	$142,891 38

Langley & Co. instead of the cash received notes. These should be postponed to the notes received for the credit portion, and as the property brought one hundred and sixty thousand ($160,000) dollars, there is more than enough to pay all the notes properly due for the credit portion of the sale, in full. The note for $20,000 being among these, there is, therefore, for distribution, $20,000, with interest from the date of the note applicable to the claims of creditors other than Langley & Co.

b. Markey & Co. At this point we may properly discuss the fourth question stated above, to wit, the right of Markey & Co. under their lien. The act under which they claim is in these words: * * * * "That from and after the passing of this act, every master mechanic, handicraftsman, and artificer, who shall erect, improve, or repair any building whatsoever, shall have a legal lien upon the building so erected, improved, or repaired, for the amount justly due him for erection of such building, improvement, or repairs; provided a memorandum or agreement in writing, in nature of a contract, be signed in the presence of one or more witnesses, by the parties to such contract, and the proprietor of the premises, or some other person lawfully authorized in writing by them, on which such building, improvement, or repairs

150 were erected or done, which contract or agreement shall contain a particular account of the work to be done, the materials to be furnished, and a general description of the said premises, and be recorded in the office of the register of mesne conveyance for the district in which such buildings are erected, or the improvements or repairs may be done; provided that such lien shall in no case be for a greater sum than the just value of which such building, improvement, or repairs shall give to the lands upon which the same may be erected.

"And provided also, that no such lien shall take effect or commence before the date of the recording of such contract or memorandum executed in manner and form aforesaid; nor shall such lien in any case ever continue or remain in force for a longer period than three years after the date thereof." * * * * 6th Statutes at Large, p. 32.

There can be no question of the validity of this lien. It is said that it is an imperfect lien, and does not rank as a mortgage. It is true that the builder's contract has none of the characteristics of a mortgage. "It may not be intended by either of the parties to create a lien. It may never become a lien. It may become a lien without the knowledge of the party on whose property it is a charge. The lien is created by recording, and becomes such from the date of record."

Kelly vs. Bank, McM. Eq., 431.

At the time of the sale, therefore, Markey & Co. had a lien on the buildings for the amount due them, second, it is true, but second only to the lien of the mortgage of Langley & Co. If the property had

brought less than this mortgage it would have been extinguished. But at the sale the whole property brought twenty thousand dollars over
151 the mortgage-debt. This sale was made by a power superior to the lien of the builders' contract, and it extinguished the lien so far as the purchaser was concerned. But it is a familiar doctrine of the court, that equity follows the fund and applies to it the same rule as it would have applied to the subject-matter of the contract.

Now, in the administration of this fund arising from the proceeds of sale of the mortgaged property, we find that Langley & Co. have a paramount claim upon funds arising from the sale of all the buildings of the Kalmia Mills Company, as well as from the sale of all the other property of the same company, and that Markey & Co. have a claim upon the funds arising from the sale of the buildings only, both being creditors of the same debtor. It would appear then that if Langley & Co. resort as they did to the whole of the estate thus charged, Markey & Co. can be substituted to their rights and should be satisfied out of the whole fund to the extent to which their own may have been exhausted. Mr. Adams, in his treatise on equity, page 271, states the doctrine with his usual perspicuity: "The equity of marshalling arises where the owner of property, subject to a charge, has subjected it, together with another estate, to a paramount charge, and the estate thus doubly charged is inadequate to satisfy both the claims. In this case if the paramount charge be by way of mortgage, the only resource for the puisne mortgagee is to redeem it and then to tack it to his own debt; but if it is only a charge payable out of the produce of the estate, and not conferring on the paramount creditor a right to foreclose, an equity arises for marshalling the security so that both creditors may, if possible,
152 be paid in full. * * * * It is an equity against the debtor himself. * * * * If, therefore, the paramount creditor resorts to the doubly charged estate, the puisne creditor will be substituted to his rights, and will be satisfied out of the other fund, to the extent to which his own may be exhausted."

See also 2d Spence's Eq. Jur., 834.

Fowler vs. Barksdale, Harper's Ch., 164.

The paramount creditor in this case having sold the whole property of the common debtor, as well that under the builder's lien as that not bound by it, and the amount of the sale being sufficient to cover both debts, the puisne creditor under the latter has the right to be paid out of the surplus. This surplus is represented by the note for $20,000.

I am of the opinion, therefore, that Markey & Co. have a prevailing lien upon the fund represented by this note, and the proceeds, therefore, should first be applied to the payment of their claim before it is applied to the payment of the claims of general creditors.

On 23d April, 1867, it was $.

Since that time it has not been reduced by any payments by Harvey Cogswell, trustee.

c. The claim of Gustavus Volger.

In order to a complete understanding of this claim, I repeat the facts connected with it. The Kalmia Mills Co. purchased one of the tracts of land upon which its buildings were erected, from the agent of Volger, for cash. Owing to the absence of Mrs. Volger, the wife of Gustavus Volger, in Europe, it was impossible to obtain her renunciation of dower.

To meet this difficulty, only one-half of the purchase-money was
153 paid in cash, and the remainder was withheld by the company, payable on the execution of the renunciation of dower. No mortgage was executed to secure this half, and the title was delivered and

possession assumed by the vendee. It is asserted that Volger had an equitable lien for the purchase-money unpaid. After the execution of the title and the delivery of possession, Langley & Co. obtained legal liens on the same property under the mortgages of the vendee, and Markey & Co. and other creditors gave credit to the company, all without notice of this supposed equitable lien. The question is between these creditors and Volger. In South Carolina, from the earliest time, the vendor had no lien on the land for his purchase-money.

Wragg vs. Comptroller General, 2 DeS., 509. And since our act of 1843 on the subject of recording mortgages, Statutes at Large, page , such a lien seems to be forbidden by statute. It is true that Cogswell and his associates settled this claim as if it was a lien, and have always held it as a sacred obligation. This, however, cannot give it such a character as against creditors, especially creditors without notice. I am of the opinion that this claim of Volger's can only rank as a debt without lien.

It has been paid in full by Evans, Cogswell and Mordecai, and was included among the debts secured by the note for $20,000. The parties paying the claim have the right to stand in the place of Volger, and to receive the proportion of the $20,000 note to which the claim was entitled.

The amount paid by them was $7,322.25, seven thousand three hundred and twenty-two $\frac{25}{100}$ dollars.

154 SECOND.

Creditors holding no lien, who held claims on 23d April, 1867,—the day of the first sale—and whose debts the note for $20,000 was intendee to protect.

These may be divided into two classes:

First. Those whose claims have never been paid.

Second. The claims paid by Harvey Cogswell, trustee, and for which he might be able now to set up his claim upon the proceeds of the note for $20,000.

In the first class are the creditors named in Schedule No. 1, hereto attached.

Second. The claims paid by Harvey Cogswell, trustee, are to the following parties and in the amounts following, that is to say:

Peoples' National Bank, paid on account of note for $3,500	1,000 00
Amounts paid at sundry times, from 23d April, 1867, to 19th March, 1868, in small sums, to employees of Kalmia Mills, as per receipts	523 32
Debt of Kalmia Mills to Gustavus Volger,	7,322 25
Interest and stamps paid on note of Kalmia Mills, assumed by Benjamin Mordecai, Harvey Cogswell, and Benjamin F. Evans, and still endorsed by Milnor, Wilbur and Martin, due to Peoples' National Bank	415 74
155 Interest, exchange, and stamps paid on two notes, of Kalmia Mills Company, amounting in all to $500, discounted in New York, endorsed by Milnor, Wilbur & Martin, and assumed by Benjamin Mordecai, Harvey Gogswell, and Benjamin F. Evans	369 38
Total amount paid by Harvey Cogswell, trustee	$9,630 69

Amounts transferred from debit of Kalmia Mills Co. to debit of H. Cogswell, trustee, being accepted orders of H. B. Claflin of New York, Henry Hunt of New York, and Peoples' National Bank of Charleston, to take up debts due them by the Kalmia Mills Company, amounting in all to		7,043 52
		$16,674 21

Recapitulation of amounts due to creditors holding no lien, who held claims on 23d April, 1867,—the day of the first sale,—and whose debts the note for $20,000 was intended to protect:

First. Those whose claims have never been paid		$22,433 08
Second. The claims paid by Harvey Cogswell, trustee, and for which he can now set up his claim upon the proceeds of the note for $20,000		9,630 69
156 Orders of H. B. Claflin and Henry Hunt of New York, and the Peoples' National Bank of Charleston, accepted by Harvey Cogswell, trustee, being amounts due these parties by the Kalmia Mills Co.		7,043 52
Total amount of debts due		$39,107 29
To pay the above amount we have the joint note of Cogswell, Evans, and Mordecai, dated May 10th, 1867, for	20,000 00	
Interest on the same from May 10th, 1867, to		
		$

It will appear from the above statement that Harvey Cogswell, trustee, has paid claims which would have been entitled to a dividend in the above note of $20,000 to the amount of sixteen thousand six hundred and seventy-four $\frac{21}{100}$ dollars.

Debts have been proved against the estate of Harvey Cogswell, trustee, in this case, in the amount of forty-three thousand five hundred and forty-six $\frac{25}{100}$ dollars, as will appear from the statement marked "Schedule 2," hereto attached.

The payments thus made by Cogswell, trustee:

First. Might go either toward the reduction proportionably of the amount due on the note.

157 Second. Or the creditors of Harvey Cogswell, trustee, might set up these payments as entitled to a dividend on the note for $20,000, and might claim to be subrogated to them. And if this latter view be adopted, a question would arise between Langley & Co., who were creditors of Cogswell, trustee, with a lien, and his other creditors who had no lien.

I am inclined to the opinion that, in paying these debts, Harvey Cogswell, trustee, became the purchaser of the claims of the creditors of the Kalmia Mills Co. who held them, and that he now has the right to stand in their shoes, and to claim the same dividend in this note for $20,000 as they could have claimed had he not purchased their rights. He was the debtor of Langley & Co., and his great object in making these payments was the increase of the security of the claim of Langley & Co.

The money was certainly paid from funds out of which Langley & Co. had a moral right, if not an equity, to require payment.

It may be that the court may conclude that this was an appropria-

tion of payment, and may give Langley & Co. the benefit of every sum of money thus expended. On these points, however, I am not prepared to express an opinion, because the creditors of Harvey Cogswell, trustee, have not been heard before me, and because all the parties—Evans, Cogswell and Mordecai, who made up the firm of Harvey Cogswell, trustee—have been adjudicated bankrupts, and the assignee of no one of them is a party to these proceedings—at the least they are not represented.

C. H. SIMONTON,
Special Referee.

158 SCHEDULE No. 1.—*Showing the creditors of the Kalmia Mills Company. These debts have never been paid.*

Empire steam-saw mill, S. B. Woodberry, agt., Blackville, S. C.	$144 00
James M. Eason & Brother, Charleston, S. C.	411 35
Colleton Glover, Graniteville, S. C.	316 00
John & Thomas A. Bones, hardware-merchants, Augusta, Ga.	155 47
Montgomery Daily Advertiser, Montgomery, Alabama	8 00
B. C. Hard, Graniteville, S. C.	50 00
John Phinizy, Augusta, Ga.	341 10
Green Maddox & Co., Graniteville, S. C.	17 50
J. E. Adger & Co., Charleston, S. C.	1,065 16
David Briggs, East Bay, Charleston, S. C.	568 88
Cameron, Barkley & Co. "	1,008 50
C. N. Averill & Son "	510 49
William Mundy, Graniteville, S. C.	186 65
Robert Schley, Augusta, Ga.	308 69
Armory Coffin, Phœnixville, Pa., (care A. Coffin, M. D., Aiken, S. C.)	238 34
Thomas J. Heyward, jr., Aiken, S. C.	123 81
P. Trapier Hayne, (care Hon. Isaac W. Hayne, Charleston, S. C.)	114 68
John E. Marley, (agent's office, S. C. R. R.) Augusta, Ga.	695 92
Thomas Dunnegan, brick-maker, Augusta, Ga.	4,494 30
William J. Rutherford, Augusta, Ga.	630 30
159 J. Morton Poole & Co., Wilmington, Deleware	566 33
Daniel W. Branch, (bankrupt court,) Charleston, S. C.	205 00
Sarah E. Sperry, Baltimore, Md., (B. F. Evans, trustee)	471 00
William A. Branch, (care J. L. Branch, Graniteville, S. C.)	219 00
Hillorey Jackson, Graniteville, S. C., laborer	41 00
Edward Dunbar, " "	32 11
Isaac Blaylock, " "	28 95
William Lucas, " "	41 27
Benjamin McLean, Aiken, S. C. "	6 88
William Nellums, " "	5 88
S. Terry, " "	43 99
Alfred Stedman, Graniteville, S. C. "	25 82
Joseph Glover, " "	8 03
John Carpenter, " "	12 91
John Wallace, " "	20 89
William Wigfall, " "	2 25
Green Maddox, " "	3 89
Hunter Spincell, " "	36 67
William Martin, " "	14 89

John Davis,	"	"	27 35
Peter Mitchell,	"	"	36 12
G. W. Campbell,	"	"	110 93
V. I. Clayton,	"	"	32 63
Charles Sluvling,	"	"	106 92
John Napier,	"	"	7 00
160 F. L. Palmer, Augusta, Ga.,		"	130 25
John King, Graniteville, S. C.,		"	67 53
Essex Teaque,	"	"	51 80
J. S. Williams,	"	" (subject to discount for house-rent)	100 00
A. Ready, Graniteville, S. C			4 97
William Aouvey, "			23 70
Levi Thomas			19 26
Edward Gordon, Graniteville, S. C			42 42
William Dudley,	"		5 26
Anson Jones,	"		19 57
Boston Tyler,	"		20 39
Albert Harris,	"		2 87
Jesse Smith,	"		34 12
Joshua Smith,	"		9 34
Alfred Mack,	"		1 05
Henry Tillman,	"		35 72
Henry Ardis,	"		4 23
Aaron Rollins,	"		4 25
H. A. Markey, Augusta, Ga.			23 87
S. Nesbit, Graniteville, S. C.			2 00
J. Highland, "			9 50
J. Robinson, "			1 50
Isaac Branch, "			22 50
George Morris, "			5 50
161 M. Barton, Graniteville, S. C			5 25
C. Williams, "			1 50
A. M. Ford, "			1 50
E. Butler, "			3 00
Carter Williams, "			1 00
Ch. Richardson Miles, Charleston, S. C			1,050 00
Butler & Youmans, Edgefield C. H., S. C			555 00
Charleston Daily News, Charleston, S. C			49 80
" Mercury, "			48 59
Stockton & Co., printers Augusta Constitutionalist			13 00
Savannah Republican, Savannah, Ga			12 00
W. A. Read & Co			5 00
W. H. Warren & Co., Augusta, Ga			49 00
Milnor, Wilbur & Martin, Charleston, S. C., (borrowed money)			
Evans & Cogswell			4,000 00
W. P. Finley, assignee of Francis Murry, Aiken, S. C., (judgment of provost court, contested)			1,192 92
F. L. Markey & Co., contractors with Kalmia Mills Company.			
Mrs. S. A. Oakman, (care Genl. Johnson Hagood,) Barnwell C. H., S. C			38 38
Accepted orders of Brux & Dartic and J. A. Brux			1,368 69
Amount due to B. F. Evans, for services as president of Kalmia Mills Company, from organization of the company, in August, 1864, to present time			

162 SCHEDULE No. 2.—*Showing the debts proved against the estate of Harvey Cogswell, trustee.*

Note of Evans & Cogswell, payable to the order of Benjamin Mordecai, deposited with Goodrich, Wineman & Co., as collateral security for their letter of credit used in New York, due December 13, 1867 ..... 2,500 00

Note of Evans & Cogswell, favor of Benjamin Mordecai, discounted by E. Q. Bell, of New York, due June 1, 1868.... 1,733 34

Draft of Evans & Cogswell, accepted by Benjamin Mordecai, and endorsed by Milnor, Wilbur & Martin, discounted by Henry Hart, of New York, due December 28, 1867..... 2,740 00

Draft of Evans & Cogswell, accepted by Benjamin Mordecai, and endorsed by Milner, Wilbur & Martin, discounted by Claflin & Co., New York, due January 16, 1868..... 2,550 18

Evans & Cogswell's note, favor of Benjamin Mordecai, endorsed by Milnor, Wilbur & Martin, discounted by the People's National Bank, due February 21, 1868.... 2,500 00

163 For the above three notes and for the borrowed money due to Messrs. Milnor, Wilbur & Martin by the Kalmia Mills, they hold as col. security a note of John W. Grady, dated Nov. 6, 1866, for $6,625.42, secured by a mortgage on the "Williston Hotel," and also the notes of Rev. James P. Boyce, dated April 10, 1866, one day after date, one note for $5,000 and the other for $4,800.

Joint note of Evans & Cogswell and Benjamin Mordecai, in favor of F. L. Markey & Co., dated November 1st, 1867, with interest, passed by F. L. Markey & Co. to Pressley, Lord & Inglesby 500 00

Evans & Cogswell's draft on Benjamin Mordecai, dated Dec. 17, 1867, with interest from date, favor of F. L. Markey & Co., and passed by them to J. H. Renneker, of Charleston. 500 00

Evans & Cogswell's draft on Benjamin Mordecai, dated November 1, 1867, favor of F. L. Markey & Co., and passed by them to Messrs. Clacius & Witte, Charleston, S. C., for. 500 00

Evans & Cogswell's note, favor of Benjamin Mordecai, discounted by B. O'Neill, due December 28, 1868, (taken in payment of provisions for hands in our employment)..... 500 64

Evans & Cogswell's note, endorsed by Benjamin Mordecai, favor of the South Carolina Railroad Company, due January 8, 1868, (on this note there is to be a deduction, all the services it was given for not having been performed by the S. C. R. R. Co.)..... 2,296 47

164 Evans & Cogswell's note, endorsed by Benjamin Mordecai, favor of S. Y. Tupper, of Charleston, (for insurance)..... 158 35

Evans & Cogswell's note, endorsed by Benjamin Mordecai, favor of T. Tupper & Son, for tin to cover roof of cotton-mill building, due 27, 1867..... 461 67

Joint note of Evans & Cogswell and Benjamin Mordecai, favor of F. J. Pelzer, dated October 15, 1867, one day after date, with interest..... 500 00

Note of Evans & Cogswell, endorsed by Benjamin Mordecai, favor of N. Levin, of Charleston, due February 18, 1868.... 250 00

Due bill of Harvey Cogswell, trustee, to Benjamin Mordecai, dated August 2, 1867..... 1,201 19

Due bill of Harvey Cogswell, trustee, to Evans & Cogswell		150 00
Scofield, Williams & Co., Augusta, Ga., (tin-work on roof)		95 75
Thompson & Brother, for provisions, Charleston, S. C		493 50
P. T. Hayne, Charleston, employee		260 50
Ch. Richardson Miles, prof. services		1,250 50
William Matthiessen, agent, Charleston, S. C		49 85
Thomas Dunnegan, Hamburg, S. C., (bricks furnished)		444 00
Jeffords & Co., Charleston, S. C., (provisions for hands)		383 89
Olney & Co., (lime)		223 40
J. E. Adger & Co., (hardware)		44 05
David Briggs, (paint and oils)		346 77
Goodrich, Wineman & Co		12 60
James M. Eason & Brother, (castings)		75 95
165 South Carolina Railroad Co., (Augusta agency, freight)		172 80
B. O'Neill		3 20
William Munday, employee		152 83
Geo. W. Campbell, "		95 31
V. J. Clayton, "		88 74
William Martin, "		63 00
John J. Simpkins, "		7 85
William Jordan, "		4 05
Allen Jones, "		5 57
Samuel Blaylock, "		8 00
Charles Sluvling, "		26 78
T. D. Clancy, (rope)		7 14
Charleston Daily News		15 00
Charles Quinby & Co., Charleston, S. C		150 00
		$

Notes of Harvey Cogswell, trustee, given for the purchase of the property held by W. C. Langley & Co., and amounting, as per their statement, to

Note of Harvey Cogswell, trustee, given for the purchase of the same property, and intended to secure the claims of the creditors other than Langley & Co

166 TESTIMONY.

H. COGSWELL sworn.

Examined by Mr. Pressley:

As trustee, paid Volger $7,322, which he credited on the $20,000 note. Had no assets of the Kalmia Mills.

Milnor, Wilbur & Martin endorsed three notes. These were used to renew old paper. Witness thinks that this paper was held by Langley, and the money raised by discounting these notes paid on the property.

The material of the old company on hand at formation of the new company was sold, excepting some mules. Is asked about the tools; seems not to know anything.

There was lumber on hand which was used by the new company.

When witness purchased at the sale, he purchased everything on the place, tools, materials, &c. Does not think that the Volger claim was sued before first sale; thinks it was started on the day of sale. Witness knew when he bought that the claim existed and had not been paid. Witness and Evans and Mordecai gave their personal notes for the claim on the day of sale. The mortgage given by witness at the first

sale was executed after said personal notes were given to Volger. Did not at that time notify Markey & Co. or any person that the
167 $20,000 note was subject to reduction by a payment of a note already given by him as aforesaid. Did agree that his bid at the sale should cover the Volger debt and all the debts, their intention being that nobody should lose.

Thinks that with the assets with which the company had (Boyce and Grady notes) that $20,000 would have covered all the debts due, including the Volger debt.

Paid Volger debt in usual course of business, as a note given by witness and his associates. At time of payment no credit was placed on the $20,000 note. Does not remember that he gave any direction to any one that it should be so applied. It was simply a payment made on an obligation he and his partners were bound to pay.

His reason for saying that this Volger matter should be a credit on the $20,000 note was that it had nothing to do with Mr. Langley.

Volger claimed that his note was an incumbrance on the property at the sale. Evans held the $20,000 note for the benefit of the creditors.

The Volger debt was negotiated in the same way as that of Markey. One, however, was closed by sealed notes, the other not.

This Volger matter was paid and entered upon the books just as he paid and entered any other debts of the Kalmia Mills, such as the wages of operation, &c.

B. F. EVANS sworn:

Was president of Kalmia Mills.

Note for $20,000 was assigned to witness. Before, during, and after the sale witness was advised by his attorney that he had a right to credit on $20,000 note any sum he paid for Kalmia Mills. Has
168 asked if it was necessary to put the endorsement of credit on the note when each payment was made, and was advised by his attorney that it was not necessary.

Paid the Volger debt as part of debt covered by the $20,000 note. Witness ranked it next debt due to Langley & Co., in nature of a lien.

Made with Markey & Co. an agreement which differed from that of Volger in this: They claimed, not that they should be paid—everybody thought they would be paid—but that they should be allowed to finish their contract.

In mind of witness Volger note was included in the $20,000 note.

None of the payment made were from assets of the company.

Does not mean that Volger had a lien, but it was a sacred debt.

On the day of sale it was understood that all claims should be paid out of the $20,000 note.

Does not remember that Markey & Co. agreed to waive any lien they may have had.

Mr. Miles put in evidence the papers in the Volger case.

169 EXHIBIT A.

THE STATE OF SOUTH CAROLINA:

Memorandum of agreement made and entered into this tenth day of May, A. D. 1867, between William C. Langley & Co., of the first part, and Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, of the second part.

Whereas the land, buildings, machinery and appurtenances of the

Kalmia Mills were, on the twenty-third day of April last, sold at public auction by Wardlaw & Carew, by order and direction of said William C. Langley & Co., under powers of sale reserved to them in two mortgages by the said Kalmia Mills, bearing date the twenty-eighth day of July and the third day of November, A. D. 1866, respectively; and whereas the said Harvey Cogswell became the purchaser of the said mortgaged premises at the said sale for himself and the said Benjamin F. Evans and Benjamin Mordecai and others, at and for the sum of twenty thousand (20,000) dollars over and above the amount of the debt due to the said William C. Langley & Co., and secured by the said mortgages; and whereas the terms of sale at which the said property was sold were one-third cash, balance in six, nine, and twelve months,
170 secured by mortgage of the property; and whereas the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, the purchasers, are not able to comply with the said terms of sale; and whereas it is agreed between the said William C. Langley & Co. and the said purchasers that the said William C. Langley & Co. will grant more liberal terms to the purchasers than those prescribed at the sale, by accepting the notes of the said purchasers for the entire amount of purchase-money, with interest, without requiring any payment in cash, upon receiving from the said purchasers additional collateral security for the payment of the said notes:

Now, this agreement witnesseth that the said parties, in consideration of the premises, do each and every of them bind themselves, and each and every of their heirs, executors, administrators, and assigns, each to the other, as follows:

First. The said William C. Langley & Co., in consideration of the covenants and agreements by the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai herein made, agree as follows:

To accept in payment of the debt due to them this day by the Kalmia Mills under the said mortgages the following notes of the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, under seal, bearing date the same day as these presents: One note (for the principal of the said debt) for one hundred and eighty thousand (180,000) dollars, payable on the twelfth day of January, 1868, with interest from date at the rate of seven per cent. per annum, and three other notes (for the interest) of the same parties, each for the sum of four thousand seven hundred and seventy-nine $\frac{02}{100}$ dollars, payable at five, six, and seven months respectively from the date hereof, with interest from date at the
171 rate of seven per cent. per annum; and upon execution and delivery of the said notes, and also of another note for the sum of
dollars, which, being for an amount over and above the amount of the debt of the Kalmia Mills to the said William C. Langley & Co., is to be assigned by the said William C. Langley & Co. to the said Kalmia Mills, the said William C. Langley & Co. will, as the attorneys of the Kalmia Mills, sign, seal, execute, and deliver a conveyance of the said mortgaged premises so sold as aforesaid to the said Henry Cogswell, in trust, first to pay the said notes for the purchase-money, and then in trust for such uses as he and the said Benjamin F. Evans and Benjamin Mordecai shall by deed declare, and will enter satisfaction on the two mortgages of *of* the Kalmia Mills aforesaid; provided also that the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, and each and every of them, shall within a reasonable time execute to the said William C. Langley & Co. such bond or bonds and mortgage or mortgages of the real estate owned by each of them respectively, and particularly mentioned, described in the next succeeding clause of this agreement, as

shall be necessary for the purpose of indemnifying and saving harmless the said William C. Langley & Co. from all loss or damage by reason of the non-payment of the said notes or any of them, or any renewals of the same; the said mortgages to contain full and sufficient covenants for the accomplishment of the purposes aforesaid, and also powers of sale in the mortgages upon default of payment; and the title to the property so mortgaged to be approved by the said William C. Langley & Co. or their attorney, C. R. Miles, esq.

172 Second. The said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai agree with the said William C. Langley & Co. to execute and deliver the said notes under seal for the purchase-money of the Kalmia Mills in the preceding articles of this agreement specified; also to execute to the said William C. Langley & Co. their bond of indemnity against all loss or damage by reason of the non-payment of the said notes or any of them as hereinbefore specified; and also to execute mortgages to secure the said bond of indemnity (or the said mortgages shall be made to contain such covenants as shall be necessary and proper to give complete indemnity as aforesaid) of the following real estate, owned by themr espectively, to wit:

Benjamin F. Evans and Harvey Cogswell will execute a mortgage of the following property, owned by them jointly, viz: The two stores, now in one, situated on Broad street and East Bay streets, in the city of Charleston, formerly occupied by Evans & Cogswell as a stationary store and printing-office; also all of that vacant lot, situated in the town of Columbia, South Carolina, with the bricks and materials thereon, purchased by the said Evans & Cogswell from John J. Kinsler, and formerly occupied by them, and used as printing-offices.

Benjamin F. Evans will execute a mortgage of the vacant lot in the town of Columbia on which his residence formerly stood.

Harvey Cogswell will execute a mortgage of the house and lot owned by him in the said town of Columbia.

The said Benjamin Mordecai will execute a mortgage of the
173 following real estate: The lot and store No. Hayne street, Charleston, formerly owned and occupied by P. M. Cohen & Co. as a drug-store.

The lot and buildings at the southeast corner of St. Philip's and Wentworth street, in the city of Charleston, purchased from Schnierlie, embracing the stables on St. Philip's street.

The vacant lot at the corner of Broad and Friend streets, in the city of Charleston, purchased from the executor of James L. Petigru; also the vacant lot on broad street, adjoining the last-named lot to the west, formerly owned by Schnierlie; also those several tracts of pine land in the State of Florida, containing in all about twelve thousand (12,000) acres, purchased from A. S. Cutts.

Third. It is mutually understood and agreed, by and between the parties to these presents, that if default shall be made in the payment of the notes herein agreed to be given to the said William C. Langley & Co. by the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai for the purchase-money of the Kalmia Mills property aforesaid, *that* the said Kalmia Mills property so purchased by them shall be first sold under the power and trust contained or to be contained in the conveyance thereof, and the net proceeds of sale first applied to the payment and liquidation of the said notes and indebtedness to the said William C. Langley & Co., before the mortgages given by the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai of their individual property

as collateral security for the payment of the said notes shall be resorted to and enforced.

In witness whereof the said parties have hereunto set their hands the day and year first above written.

174 EXHIBIT B.

THE STATE OF SOUTH CAROLINA:

Know all men by these presents, that we, Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, are held and firmly bound unto William C. Langley, Samuel Keyser, and Charles D. Cooke, copartners in trade, under the name and style of William C. Langley & Co., in the full and just sum of one hundred thousand ($100,000) dollars, to be paid unto the said William C. Langley, Samuel Keyser, and Charles D. Cooke, copartners as aforesaid, their certain attorney, executors, or administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, and each and every of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the tenth day of May, in the year of our Lord one thousand eight hundred and sixty-seven, (1867,) and in the ninety-first year of the Independence of the United States of America.

Whereas at the sale at auction by Wardlaw & Carew, auctioneers, of the Kalmia Mills property, on the twenty-third day of April, A. D. one thousand eight hundred and sixty-seven, under and by virtue of the power of sale upon default of payment reserved to the mortgagees in two mortgages by the Kalmia Mills to William C. Langley & Co., bearing
175 date the twenty-eight day of July and third day of November, A. D. one thousand eight hundred and sixty-six, (1866,) the said property was knocked down to Harvey Cogswell for the sum of twenty thousand (20,000) dollars over and above the amount of the debt due by the said Kalmia Mills to the said William C. Langley & Co secured by the said mortgages, he being at that price the highest bidder;

And whereas the said Harvey Cogswell bid off the said property for himself, Benjamin F. Evans, and Benjamin Mordecai, and such other persons as shall or may join with them in the formation of a new company for the completion of the manufactories now in course of erection upon the said land;

And whereas the terms upon which the said property was sold were one-third cash, the balance payable in six, nine, and twelve months, secured by mortgage of the property;

And whereas the purchasers aforesaid not being able to comply with the said terms of sale, the said William C. Langley & Co. agreed to accept from the said purchasers their promissory notes, under seal, for the entire amount of the debt due to them by the said Kalmia Mills, and the entire amount of the purchase-money bid by the said Harvey Cogswell, without requiring from the said purchasers any payment in cash beyond the amount necessary to defray the expenses of the sale, upon the said purchasers giving to them approved collateral security in addition to the security of the property so purchased by them, as is fully set forth in a memorandum of agreement in writing signed by the said parties and bearing even date herewith;

176 And whereas, in pursuance of the said agreement and understanding, the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai have executed to the said William C. Langley & Co. their joint and several promissory notes, under seal, all bearing date the same day as the day of the date of these presents, in the following amounts, viz:

One note for one hundred and eighty thousand (180,000) dollars, payable on the twelfth day of January, eighteen hundred and sixty-eight, (1868,) with interest from date at the rate of seven per cent. per annum at the First National Bank of Charleston;

Three other notes of the same parties for the sum of four thousand seven hundred and ninety-nine dollars and two cents ($4,799.02) each, payable at five, six, and seven months respectively from the date thereof, with interest from date at the rate of seven per cent. per annum, at the same bank; and also one note for the sum of 20,000 dollars, payable on the twenty-third day of April, one thousand eight hundred and sixty-eight, (1868,) at the same bank, with interest from date at the rate of seven per cent. per annum, (which last-mentioned note, being for an amount over and above the debt of the Kalmia Mills to the said William C. Langley & Co., is to be assigned by the said William C. Langley & Co. to the said Kalmia Mills,) which notes have been accepted by the said William C. Langley & Co., and the entire property embraced in the two mortgages to the said William C. Langley & Co., and disposed of at the sale aforesaid, has, by deed bearing even date herewith, been conveyed by William C. Langley, Samuel Keyser, and Charles D. Cooke, as the attorneys of the said Kalmia Mills, to the said Har-
177 vey Cogswell, in trust first to pay the above-mentioned notes given for the purchase-money, and subject to the said trust for such uses as they, the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, shall by deed declare, with power therein reserved by the said William C. Langley & Co., upon default of payment of any of the said notes, to sell the property so conveyed without proceedings at law or equity, and apply the proceeds of sale to the payment of the said notes:

Now, the condition of the above obligation is such that if the above-bound Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, their or either of their heirs, executors, administrators, or assigns, shall well and truly pay, or cause to be paid, to the said William C. Langley, Samuel Keyser, and Charles D. Cooke, copartners in trade, under the name and firm of William C. Langley & Co., and the survivors or survivor of them, and the executors, administrators, or assigns of such survivor, all and every such amount or amounts as shall or may remain due and payable upon the promissory notes aforesaid given by them for the purchase-money of the said Kalmia Mills property aforesaid, or upon any of them, or upon any renewal or renewals of the same, after the property so conveyed in trust shall have been sold and the proceeds applied to the payment of the said notes, and also shall well and truly pay or cause to be paid to the said William C. Langley & Co. all such sum and sums of money as shall or may be hereafter advanced and paid and loaned to them, the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, by the said William C. Langley & Co., principal and interest, and shall and will also well and truly indemnify and
178 save harmless the said William C. Langley & Co., from all loss or damage which they shall or may sustain by reason of the insufficiency of the proceeds of sale of the property so conveyed to the said Harvey Cogswell as aforesaid to pay the entire debt due to the said William C. Langley & Co., principal and interest as aforesaid, then this obligation to be null and void; otherwise to remain in full force and virtue.

Signed, sealed, and delivered in the presence of—

Respectfully submitted.

CHARLES H. SIMONTON.

1st Nov., 1870.

(Indorsed:) United States of America, South Carolina district In the circuit court. In equity. W. C. Langley & Co. vs. Harvey Cogswell et al. F. L. Markey & Co. vs. W. C. Langley & Co. Report of C. H. Simonton, special referee.

And on the 12 day of November, A. D. 1870, came into court the said W. C. Langley & Co., by Ch. Richardson Miles, his solicitor, and filed their exceptions to referee's report; which exceptions are in words and of the tenor following:

Exceptions.

179 UNITED STATES OF AMERICA,
District of South Carolina:

W. C. LANGLEY & CO.
vs.
HARVEY COGSWELL ET AL. } In equity.

F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO. ET AL. } Exceptions to report of special referee.

The complainants, W. C. Langley & Co., except to the report of C. H. Simonton, esq., special referee, upon the following grounds:

First. It is respectfully submitted that the referee has erred in recommending that the portion of the purchase-money at the sale of April, 1868, which the purchaser, Wm. C. Langley, has given security to pay into this court whenever ordered, to stand in place of the property and subject to the liens and equities of the several parties, shall be applied, first, to the satisfaction of the amount due on the note of Cogswell, Evans, and Mordecai for $20,000, assigned to the Kalmia Mills, while the notes of the same parties to W. C. Langley & Co. are unpaid, in consequence of the said W. C. Langley & Co. not having exacted payment in cash of one-third of the purchase-money bid at the sale of 23d April, 1867. Report, p. 28.

The arrangement made by Langley & Co. with the purchasers, at the sale of April, 1867, by which indulgence as to payment was given, it is submitted, did not impair or disturb the lien of Langley & Co., and their right to priority of payment out of the purchase-money—

1. Because the said arrangement was made in pursuance of the express power given to Langley & Co. in the mortgages under which the sale was made.

180 2. Because the said arrangement procured the bid for the property over and above the mortgage-debt; was necessary to secure the advantageous sale which had been made; was for valuable and adequate consideration, viz, the mortgage of additional property to secure the payment of the entire purchase-money; was intended and well calculated to protect the rights and further the interest of all creditors of the Kalmia Mills subsequent to Langley & Co.; and therefore in accordance with the duty of Langley & Co., as agents and attorneys of the mortgagor and trustees

under mortgages, with power of sale, and would have been sanctioned by the court if application had then been made to confirm it.

3. Because the said arrangement was sanctioned or acquiesced in by all the creditors of the Kalmia Mills.

When Cogswell, Evans, and Mordecai determined to purchase the property at a price sufficient to pay all the debts of the company, it was with the express purpose of completing the factory and carrying on the enterprise; and as this would involve the immediate expenditure of large amounts of money, it necessarily implied that they must receive indulgence in payment of the purchase-money; and, therefore, when "their intention to become purchasers at such price was communicated to the creditors, and was either acquiesced in or not dissented from," it involved an acquiescence in this arrangement for indulgence, which was a necessary means for carrying their intention into effect.

Report, p. 5.

Markey & Co., especially, were interested in the completion of the enterprise, and exacted from the purchasers a guarantee of their contract, continued work under it for a year, and received considerable payments on account; and, having thus benefitted by the arrangement, cannot now repudiate it.

Report, d. 10.

Second. The referee errs in holding that the payments made by Harvey Cogswell, trustee, of some of the debts of the Kalmia Mills, are not to be allowed as credits on the note for $20,000, "the amount of which," as reported by the referee, "had been made up by including the debts thus paid."

Report, p. 15.

Report, p. 10.

It is respectfully submitted that the referee should have reported, as a fact established by the evidence, that certain creditors of the Kalmia Mills, whose debts were embraced in the $20,000 for which said note was given, have been paid, and the note extinguished pro tanto; and should have reported, as necessary conclusions of law, that the amounts so paid cannot be again paid; and that the money, having certainly been paid by Harvey Cogswell, trustee, the debtor of Langley & Co., from funds out of which Langley & Co., as the creditor holding the paramount lien, had the legal and equitable, as well as "moral, right to require payment," must enure to the benefit of Langley & Co., who are entitled "to be subrogated to the rights and to stand in the shoes" of the said Harvey Cogswell, trustee, and of all the creditors who have been thus paid, and to receive the benefit of the dividend in the $20,000 note to which they or any of them would be entitled had their claims not been so paid.

Report, p. 49.

Report, p. 39.

Report, pp. 15, 16.

Third. The report of the referee is inconsistent and irreconcileable in holding, as it does, that "Langley & Co. not only had the oldest lien, but the only lien on the whole property of the Kalmia Mills. Their claim was secured by a mortgage, which contained a power to sell for cash or credit, for the purposes of satisfying this claim. The rights of all other creditors were subject to the mortgage, and to the powers therein contained, up to the hour of sale.

Therefore they had the unquestionable right to be

re-imbursed out of the proceeds of sale about to take place, and to exhaust the proceeds, if need be, in payment of their debt;" * * * that "the sale by Langley & Co. did not affect their claim for priority."

"Did Langley & Co., before or at or after the sale, do any act by which they waived their right? It does not appear that there was any reason for believing that the property was not worth much more than all the claims against it. The evidence does not cast a suspicion that Langley & Co., before the sale, made any agreement that creditors subsequent to themselves should be put upon the same footing with themselves. Two creditors (Markey & Co. and Volger) threatened to interfere with their sale under the mortgage. Markey & Co. were informed of the intention of Evans, Mordecai, and Cogswell to make the property bring enough to cover Langley's debt and all other debts; that is, enough to pay off Langley & Co. in full, and to have a surplus for distribution. They at once acquiesced. I do not understand that any contract was made with Langley & Co. that these debts of the other creditors should be paid. Mordecai, Evans, and Cogswell announced this to be their intention, and these only guaranteed its performance to Markey & Co. * * *" Report, p. 17.

"The powers conferred on Langley & Co. in the mortgage-deed made them trustees; but their duties as such trustees were to advertise the sale in a certain way; to see that the sale was fairly and openly conducted according to the custom of vendue; that it should be for cash or credit, at their option and direction; that they should pay themselves the amount due upon the notes secured by the mortgage from the net proceeds of sale, and that they should account for the surplus, if any there should be. Report, p. 18.

"Was any act done after the sale by which they surrendered their right of priority? * * *" Report, p. 21.

"After careful examination, I can discover no consideration or inducement leading Langley & Co. to any such surrender."

That "if this sale had been made under an order of court, and had been made for cash, it is clear that the debt of Langley & Co. should have been first paid; and,
183 when that was satisfied, the surplus would have gone to the mortgagor—the Kalmia Mills; and, as the mortgagor had dedicated such surplus to the creditors outstanding at the day of sale, it would have been paid over to such creditors. If the sale had been made entirely on credit, and the notes had been left in the hands of the master, it would have been his duty to apply the proceeds, as fast as collected, towards the payment, first, of the debt of Langley & Co., and after this was paid, to the other creditors. If the sale had been made partly for cash and partly on credit, and the credit portion had been kept in court, the cash would have gone to Langley & Co.; and if any balance remained unpaid to them, the proceeds of the notes, as fast as collected, would be applied to the liquidation of their lien. There seems to be no difference of opinion on this point, and the practice of our late court of equity is, as I have

Report, p. 23. stated;" that Langley & Co. did not accept the notes as payment; and yet holding that the arrangement made by them with the purchaser, by which arrangement alone was a bid procured for the property more than their debt, and the securing that arrangement by an additional mortgage of a large amount of property, was such a violation of their duty as should not only make them lose a large part of their debt, but should make them incur the penalty of paying $20,000 more to creditors of the Kalmia Mills, without lien, subsequent to themselves, and some of whom, as Markey & Co., have already been paid large sums out of the money advanced by them.

Fourth. The referee errs in stating that the bond of indemnity taken by Langley & Co., to secure the arrangement made with the purchasers, "was evidently intended
Report, p. 28. to protect them, and none other, from the consequences of their own act." The bond of indemnity, and the mortgages of individual property securing it, expressly provide
Report, p. 6. Report, p. 58. 184 for the payment of all the notes given for the purchase-money, including the note for $20,000 given for debts due to other creditors than themselves, and was taken
Report, p. 28. by Langley & Co., "as agents of the mortgagor, and custodian of the interests of other creditors as well as of themselves."

But if the view of the referee on this point be sustained, then Langley & Co. are entitled to the entire proceeds of
Report, p. 30. sale of the individual property covered by the mortgages given to secure the bond of indemnity; and whatever amount shall be derived from the funds arising from sale of a portion of this property, known as the Kinsler lot in Columbia, retained by the assignee in bankruptcy of Evans & Cogswell under the orders of this court, must be turned over to them.

Report, p. 24. Fifth. It is respectfully submitted, that if the decision of the referee, "that the note for $20,000 does not take rank, pari passu, with the rest of the notes for the credit portion of the purchase-money which were secured by the trust-deed to Harvey Cogswell, trustee," be sustained, then "the en-
Report, p. 30. tire net proceeds of the sale of the mill-property, and of the individual property sold under the mortgages, will not entirely extinguish the debt of Langley & Co., but there will still remain a balance due them, and no surplus will remain for payment of the other creditors." But if this view is not sustained, and the $20,000 note shall be held to be entitled to be paid, pari passu, with the notes given for Langley & Co.'s debt, then the amount to be applied to said note will be only such proportion of the entire purchase-money at the second sale, $160,000, as the $20,000 note bore to the entire purchase-money bid at the first sale, $214,337.07, which is $14,929; (214,337 : 20,000 : : 160,000 : 14,929.)
185 And upon this note so apportioned must, it is submitted, be credited the amounts paid on account of said note by Harvey Cogswell, trustee, $9,630.69,) and the expenses of the sales paid by Langley & Co. $1,399.83, which
Report, p. 10.

will reduce the balance of principal due on said note to about $3,898.48.

CH. RICHARDSON MILES,
Solicitor for W. C. Langley & Co.

12 Nov., 1870.

(Indorsed:) United States of America. South Carolina district. In the circuit court. In equity. W. C. Langley & Co. vs. Harvey Cogswell et al. F. L. Markey & Co. vs. W. C. Langley & Co. et al. Exceptions to referee's report. Ch. Richardson Miles, solicitor for W. C. Langley & Co.; Pressley, Lord & Inglesby, contra.

186 And on the 12 day of November, A. D. 1870, came into court, the said F. L. Markey & Co., by Pressley, Lord & Inglesby, their solicitors, and filed their exceptions to referee's report; which exceptions are in words and of the tenor following.

Exceptions.

In the circuit court.

UNITED STATES OF AMERICA,
South Carolina District:

W. C. LANGLEY & Co.
vs.
HARVEY COGSWELL ET AL.

AND

F. L. MARKEY & Co.
vs.
W. C. LANGLEY & Co.

F. L. Markey & Co., defendants in the original bill, sustain the report of the special referee, upon the following points:

1st. That, by the sale of the 23rd April, 1867, all liens existing at that time were transferred to the proceeds of sale, and in the same order of priority in which they had previously existed.

2nd. That the change of the terms of sale by Langley & Co., giving credit on the cash portion, was made by them at their own risk,

187 and for such cash portion they must look exclusively to the additional security which they took at the time.

3rd. That the proceeds of the property at the second sale being sufficient to pay the credit portion of the Langley debt, and the $20,000.00 due to the Kalmia Mills, the latter must now be paid in full out of such proceeds.

4th. That the lien of Markey & Co., of which Langley & Co. had notice at the time of the first sale, (April 23rd, 1867,) having been transferred to the proceeds of said sale, the amount still due to them must be paid out of the $20,000.00 note, before any part thereof can be applied to the general creditors of the Kalmia Mills, who have no lien.

5th. That the remainder of the said note, being a trust-fund, for the payment of all the general creditors of the Kalmia Mills, Harvey Cogswell, trustee, the debtor on said note, is not authorized to pay any of the creditors in preference to others.

Failing in sustaining these positions, Markey & Co. except to the report of the special referee upon the following grounds:

1st. Because the referee erred in holding that Langley & Co. intended to maintain their priority in the conveyance made to Harvey Cogswell, trustee, although in the cotemporaneous agreement they express-
188 ley declared that they had agreed to accept, in payment of the debt due to them by the Kalmia Mills, the notes of Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai. Page 52.

2nd. Because if the trust-deed to H. Cogswell had preserved the priority of the debt due to Langley & Co., whilst they, at the same time, without the consent of, or notice to, the other creditors, increased the burthen on the property taken to secure the whole debt, by including in the mortgage the cash portion of the purchase-money, and a provision securing future advances, such a deed would have been a fraud upon the other creditors.

3rd. If notwithstanding such fraud their priority be maintained, under the trust-deed, to the proceeds of the mill-property, the balance of the debt, after the application of the proceeds, would have no such priority over the $20,000.00 note, in the proceeds of the individual property, which had never been previously mortgaged to either party.

12 Nov., 1870.

PRESSLEY, LORD & INGLESBY,
Attys. for Markey & Co.

189 And on the 18th day of April, A. D. 1873, came into court the said parties, by their solicitors aforesaid, and upon hearing the report of Charles H. Simonton, special referee, and the exceptions thereto of Langley & Co. and Markey & Co., the court passed the following decree; which decree is in words and of the tenor following:

Decree.

UNITED STATES OF AMERICA:

South Carolina district, in the circuit court. In equity.

W. C. LANGLEY & CO.
vs.
HARVEY COGSWELL ET AL.

F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO. ET AL.

These cases, being a bill and cross-bill, came up and have been argued upon the report of a special referee, and exceptions thereto.

By the referee's report, and the exceptions thereto, four questions are presented for adjudication:

First. What effect was produced on the rights of the parties by the modification on the part of Langley & Co. of the terms of sale in 1867?

Second. What is the relative rank of the $20,000 note, and the
190 notes retained by Langley & Co., which together made up the purchase-money at the sale in April, 1867?

Third. How shall the amount of the proceeds of sale, which the $20,000 note is entitled to receive, be distributed?

Fourth. What are the rights of Markey & Co. under their mechanic's lien?

These are all involved in the general question, how shall the purchase-money of the property bought by William C. Langley at the sale on 19th March, 1868, be applied? Langley & Co. claim that they are entitled to be paid in full out of the proceeds of sale, before any other creditors of the Kalmia Mills, or of the purchasers at the sale of 1867 shall receive any portion thereof, because they had the prior and paramount lien on the said property by virtue of their mortgages, and that their right upon the fund derived from the sale of the property under their mortgages is as complete as it was in the land. Markey & Co., and the other creditors of the Kalmia Mills interested in the note for $20,000, given by the purchasers at the sale of 1867, and appropriated to the payment of their debts, deny the right of Langley & Co. to priority of payment, but insist that the proceeds of the sale of 1868 must be applied first to the payment of this note in full. They contend that had the terms of the sale of 1867, as advertised, been carried out, one-third of the bid would have been paid in cash, and the whole property would have been mortgaged to secure the remainder of the purchase-
191 money, which would have been ample security. That the property having been sold in 1867 for two hundred and fourteen thousand three hundred and thirty-seven $\frac{04}{100}$ (214,337.04) dollars, brought in 1868 one hundred and sixty thousand (160,000) dollars; and that if Langley & Co. had not burdened it with the payment of the cash portion, seventy-one thousand four hundred and forty-five $\frac{69}{100}$ (71,445.69) dollars, there would have been quite enough to pay in full the credit portion in which their twenty thousand dollar note was included. They insist, therefore, that Langley & Co. must bear this loss, because the modification of the terms of sale, made by Langley & Co., was beyond their power and authority, and in violation of their duty as trustees to sell, and was made without their knowledge or consent; and because Langley & Co. demanded and received indemnity for the modifications.

This position is sustained by the special referee, who holds that the effect of the modification of the terms of sale is the postponement of the $71,445.69, which should have been paid in cash, to the amount of $142,891.38 to be secured by notes, including the $20,000 note provided for the general creditors. At the second sale the property brought $160,000; and the referee recommends that as $40,000 of the purchase-money has been reserved to meet the result of these cases, this sum be applied to the satisfaction of the amount due on the note for
192 $20,000, and the remainder returned to Langley & Co.

Langley & Co. except to the decision of the referee on this point, and insist that the arrangement made by them with the purchasers at the sale of April, 1867, by which indulgence as to payment was given, did not impair or disturb their lien and right to priority of payment out of the purchase-money; but that in making it they acted as agents of the mortgagors, in pursuance of their power, and that if loss ensued, it must fall upon their principal, or the creditors of the principal subsequent to themselves, and not upon them:

1. Because the said arrangement was made in pursuance of the express power given them in the mortgages under which the sale was made.

2. Because the arrangement procured the bid for the property over and above the mortgage-debt; was necessary to secure the advantageous sale which had been made; was for valuable and adequate consideration, viz, the mortgage of additional property to secure the payment of the entire purchase-money; was intended and was well calculated to protect the rights and further the interests of all creditors of the Kalmia

Mills subsequent to themselves; and was therefore in accordance with their duty as agents and attorneys of the mortgagor, and trust-
193 ees under mortgages with power of sale; and would have been sanctioned by the court if application had then been made to confirm it.

3d. Because the said arrangement was sanctioned or acquiesced in by all the creditors of the Kalmia Mills, especially by Markey & Co.

After careful consideration of the facts and arguments the judgment of the court is, that these positions of Langley & Co. are all supported by the facts as reported, and by reason and authority; and sustain the arrangement made by them with the purchasers at the sale of 1867, as within the scope of their power, authority, and duty, as mortgagees, with power to sell and apply the proceeds to the payment of their debt; was binding upon all parties; and their right to priority of payment out of the purchase-money, represented by the notes of the purchasers, when collected, was not waived or unpaid.

Upon the second question the referee holds that the note for $20,000 does not take rank *pair* passu with the notes for the rest of the purchase-money secured by the trusts of the conveyance to Cogswell. Markey & Co. except to the decision of the referee on this point. The court concurs in the judgment of the referee on this question.

It has been further contended by the counsel of Markey & Co. that although Langley & Co. may have done nothing to destroy their
194 right to priority of payment from the proceeds of sale of the mill-property, yet they can have no such right as to the proceeds of sale of the individual property never before mortgaged, unless they look to that wholly for their cash portion.

It has already been adjudged that Langley & Co., as mortgagees, with power of sale, had the right to make the arrangement which they did with the purchasers, and did not thereby lose or waive their right to be paid in full before any other creditor. The conveyance to Cogswell in trust to pay the notes for the purchase-money was part of the same arrangement, and secured the payment of the creditors entitled to said purchase-money without disturbing their respective priorities. They were entitled to preserve their right to be first paid out of the additional security which they required, any balance remaining due to them after exhausting the proceeds of the mill-property, before any other creditor was paid therefrom. The agreement between Langley & Co. and the purchasers, the bond of indemnity, and the mortgages of individual property securing it, and the trust-deed to Cogswell, are parts of one arrangement, which effectually secures the payment of Langley & Co., the creditors having the paramount lien, in preference to every
195 other creditor. Langley & Co. under each and every of these instruments are made the agents, attorneys, and trustees, to sell the property, and to pay themselves from the proceeds, and are only to account for the surplus after payment of all expenses and their debt.

The third and fourth questions will be considered together.

The payments made by Harvey Cogswell, trustee, after the sale of 1867, to certain creditors of the Kalmia Mills, were all of debts, which were intended to be covered by the note for $20,000, the amount of which had been made up by including the debts thus paid. These creditors whose debts are embraced in the $20,000, for which said note was given, have therefore in fact been paid and the note extinguished, pro tanto, as much as if separate notes had been given for each debt so paid, and had been cancelled, and the amounts so paid cannot be paid again. The money so used having been paid by Cogswell, trustee, the

debtor of Langley & Co., from funds out of which Langley & Co., as the creditor holding the prior and paramount lien, had the legal and equitable right to require payment, would enure to their benefit, and they would be entitled to be subrogated to the rights of the said Cogswell, and of all the creditors who were thus paid, and to receive the
196 benefit of the dividend on the $20,000 note to which they or any of them would be entitled, had their claims not been so paid.

But as Langley & Co. have been adjudged to be entitled to be first paid the entire amount due to them, before any payment is made on the $20,000 note, which represents debts due to creditors subsequent to them, it will only be in the event of their remaining a surplus of the purchase-money bid by William C. Langley, at the sale of the mill property in 1868, or from the proceeds of the sale of the individual property sold by Langley & Co., under the mortgage given to secure the bond of indemnity (which have been adjudged to stand upon the same footing) after the payment of Langley & Co. in full, that the question submitted by the referee will arise: whether the amounts so paid by Cogswell must go to reduce proportionably the amount due on the note, or which of the creditors, subsequent to Langley & Co., are entitled to be subrogated to the rights of the creditors so paid, because of their having been entitled to be first paid before the creditors so paid by Cogswell, trustee.

The referee reports that Markey & Co. had a valid lien on a portion of the property of the Kalmia Mills by virtue of their mechanics'
197 contract, subsequent to Langley & Co.'s lien; and that no other creditor than these two firms had any lien on the property.

Markey & Co., as the creditors next in rank and priority to Langley & Co., will, in the event of their being a surplus to be applied to the $20,000 note, have the right of subrogation to which Langley & Co. would have been entitled, if this note was to be paid pair passu with the notes given for their debt; and after Langley & Co. have been paid in full, will be entitled to the same right as they would have had. It is therefore adjudged that Markey & Co. have a prevailing lien upon any surplus remaining after payment of Langley & Co., which is to be appropriated to this note, and the same shall be first applied to the payment of their claim before it is applied to the payment of the general creditors without lien.

The lien of Markey & Co., by virtue of their mechanics' contract, which has been transferred to the proceeds of sale, was a lien only upon the buildings erected by them under their contract for the amount justly due, but for no greater sum than the just value which such buildings gave to the lands upon which they were erected.

The creditors of Harvey Cogswell, trustee, after the sale of April, 1867, are sufficiently represented by the defendants Goodrich,
198 Wineman & Co., and the assignees in bankruptcy of Cogswell, Evans and Mordecai, are not necessary parties.

It is ordered, adjudged, and decreed that the exceptions to the report of the special referee taken by Markey & Co. be overruled, and that the exceptions to said report taken by W. C. Langley & Co. be sustained.

It is further ordered that the cases be referred back to the special referee, to make the calculations and apportionments necessary, and to take and state the accounts according to the principles of this decree.

18th April, 1873.

HUGH L. BOND,
Ct. Judge.

And on the 18th day of April, A. D. 1874, came into court the said

Charles H. Simonton, special referee, and filed his report; which report is in words and of the tenor following:

Report.

THE UNITED STATES OF AMERICA,
District of South Carolina:

W. C. LANGLEY & CO.
vs.
HARVEY COGSWELL ET AL.

199 F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO. ET AL.

To the honorable the judges of the circuit court of the United States sitting for said district:

Under the order of this court, filed, I had the honor to report upon the facts, and to submit certain recommendations as to the law applicable thereto.

The main questions in the cases arose from the foreclosure of certain mortgages held by W. C. Langley & Co., executed by Harvey Cogswell, trustee, and by B. F. Evans, B. Mordecai, and Harvey Cogswell, to W. C. Langley & Co., the plaintiffs in the first suit and the defendants to the cross-bill.

Langley & Co. claimed a priority of payment from the proceeds of sale growing out of the said foreclosure. The report was unfavorable to this claim; exceptions were taken thereto. By a decree of this court filed the 18th April, 1873, these exceptions were sustained, and the priority thus claimed established.

By the same decree the cases were referred back to the referee and he was instructed to make the calculations and apportionments necessary, and to take and state the accounts according to the principles of the decree.

200 Pursuant thereto I have the honor to report that I have held references, have been attended by the solicitors, and have taken testimony, and find—

The entire amount due by Harvey Cogswell, trustee, as mortgagor, to W. C. Langley & Co., on 19th March, 1868, the day of sale (former report, p. 10) was two hundred and nine thousand five hundred and eighty-seven $\frac{90}{100}$ dollars $209,587 90

This sum must be credited with the bid of Langley & Co. for the mill-property, less the expenses of sale—say $160,000

Less 1,399 83 158,600 17

Balance of debt not paid $50,987 73

Against this balance the firm of Langley & Co. had the bond of indemnity of B. F. Evans and of B. Mordecai and Harvey Cogswell, secured by mortgages of their own estate, (see printed report, page 7.)

Thus we have balance not paid $50,987 73
Interest to March 19th, 1869, (day of sale) 3,568 44
Expenses and charges under said bond 2,130 00

Total due 56,686 17

Deduct net proceeds, sale of this individual property, viz:

Charleston property, Evans & Cogswell, and Mordecai	$38,799 40		
Hayne st. property, (Mordecai)	9,045 45		
Columbia property, (Evans & Cogswell)	3,017 50		
Florida property, (Mordecai)	1,209 17		
201 Dividend from bankrupt est. of Mordecai	77 14	52,148 66	
Balance unpaid		$4,537 51	
Interest on this balance from Mch. 19th, 1869, to the date of this report		1,614 62	
Amount due April 18th, 1874		$6,152 13	

The sales thus credited embrace all the property covered by the mortgages for the security of the bond of indemnity, except a parcel of land purchased from John J. Kinsler by Evans & Cogswell, and situate in Columbia.

This property was purchased during the war. At the date of the purchase there were sundry outstanding unsatisfied judgments against Kinsler, which constituted a lien on the property. Kinsler, however, was possessed of a large estate, more than sufficient to pay his debts, and it was supposed that the danger from the judgments was very remote.

After the war the estate of John J. Kinsler proved to be insolvent, and was administered in a suit in the court of common pleas for Richland County, brought by the executors of John J. Kinsler vs. Mary A. Holmes et al.

The lot mortgaged to W. C. Langley & Co., by Evans & Cogswell, was sold by G. H. Sass, assignee in bankruptcy of Evans & Cogswell, under order of the bankrupt-court, freed from all liens, and the proceeds of sale held in place of the land to abide the result of the administration of the estate of Kinsler. Upon an order made in the bankrupt-court on
202 the 23 February, 1870, the net proceeds of sale of this lot, remaining in the hands of G. H. Sass, assignee, were loaned to Daniel B. Lewis, executor of Robert N. Lewis, one of the judgment-creditors of John J. Kinsler, upon his bond, secured by mortgage of real estate in the city of Columbia, conditioned for the payment of eight thousand six hundred and sixty-six $\frac{76}{100}$ dollars, with interest from date, "should the said estate of John J. Kinsler, decd., prove adequate to satisfy the said lien of the said Daniel B. Lewis, executor of Robert N. Lewis."

The assets of the estate of John J. Kinsler have not yet been fully marshalled, but it is considered that the estate will not "prove adequate to satisfy the lien of the judgment" against it in favor of Daniel B. Lewis, executor of Robert N. Lewis, and that therefore nothing will be realized from the sale of the lot to be applied to the payment of the amount due under the bond of indemnity which it was mortgaged to secure.

As the result, we find that all the property formerly of the Kalmia Mills and all the separate property of Evans, Cogswell, and of Mordecai has been exhausted, and the debt due to W. C. Langley & Co. is not paid in full. Evans & Cogswell and Mordecai have all been adjudicated bankrupts, their estates have been exhausted, and they discharged.

203 As the lien of W. C. Langley & Co. has been decreed to be prior to all others, and the debt secured by it has not been paid

as to six thousand one hundred and fifty-two $\frac{13}{100}$ dollars, the other parties to the suit can take nothing.

Under an administrative order in these suits, made on 28th March, 1870, W. C. Langley entered into a bond to the clerk of this court, with Edwin Bates and F. J. Pelzer as sureties, in the penal sum of forty thousand dollars, conditioned to pay into court such sum or sums as he shall be ordered so to pay in either of the said causes. As the accounting had under the decree of this court shows that W. C. Langley & Co. have not been paid in full after crediting upon the debt due to them the entire amount realized from the sale of the mortgaged property, I respectfully recommend that this bond be cancelled, and delivered up to W. C. Langley & Co. by the clerk of the court.

All of which is respectfully submitted.

18 April, 1874.

CHARLES H. SIMONTON,
Referee.

204 And on the 25th day of April, A. D. 1874, came into court the said parties, by their solicitors aforesaid, and, upon hearing the report of Charles H. Simonton, special referee, the court passed the following final decree; which final decree is in words and of the tenor following:

Final decree.

UNITED STATES OF AMERICA:

District of South Carolina, fourth circuit. In equity.

W. C. LANGLEY & CO.
vs.
HARVEY COGSWELL ET AL.

F. L. MARKEY & CO.
vs.
W. C. LANGLEY & CO. ET AL.

The decree filed in these causes on the 18th April, 1873, established the right of W. C. Langley & Co. to be first paid in full from the proceeds of sale of the entire property embraced in the deed of trust and mortgages to them; and the causes were referred back to the special referee to take and state the accounts in accordance with the principles of the decree.

205 The report of the special referee, filed on the 18th April, 1874, and which is not excepted to, shows, as the result of the account so taken, that after crediting upon the debt due to W. C. Langley & Co. the whole amount realized by them from the sales of the entire property, made under the orders of the court, their remains due to them a balance of six thousand one hundred and fifty-two $\frac{13}{100}$ dollars.

Cogswell, Evans, and Mordecai, the parties to these causes, who were liable for the payment of this balance, have all been discharged in bankruptcy and their estates distributed in the bankrupt-court.

W. C. Langley & Co. not having been paid in full, the other parties to the causes cannot take anything, and W. C. Langley cannot be required to pay anything into court under his bond given to the clerk of this court.

The causes will therefore be ended by this decree.

It is ordered and decreed that the report of C. H. Simonton, esq., special referee in these causes, filed on the 18th April, 1874, be confirmed.

It is further ordered that the bond entered into by William C. Langley to the clerk of this court, with Edwin Bates and F. J. Pelzer as sureties, dated 28th March, 1870, be cancelled and delivered up to the said William C. Langley by the clerk of this court.

206 It is further ordered that the cross-bill filed by F. L. Markey & Co. be dismissed, and that the costs of both cases be paid by F. L. Markey & Co.

April 25th, 1874.

HUGH L. BOND,
Ct. Judge.

And on the 27th day of April, A. D. 1874, came into court the appellants, by Pressley, Lord & Inglesby, their solicitors, and filed the following summons to join in appeal; which summons is in words and of the tenor following:

Summons.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

The President of the United States of America to George Herbert Sass, assignee in bankruptcy of Harvey Cogswell and Benjamin F. Evans, J. Edmund Burke, assignee in bankruptcy of Benjamin Mordecai, the Kalmia Mills Co., George C. Goodrich, Philip Wineman, and John Ashhurst:

You are hereby summoned to be and appear before the judges of the Supreme Court of the United States, at the Capitol at Washington, D. C., on the first Monday of December next, then and there to join

207 with Francis L. Markey, Isaac Branch, & Daniel W. Branch in prosecuting an appeal from the decree of this court, made against you on the complaint of William C. Langley, Samuel Keyser, & Charles D. Cook, citizens of the State of New York, and copartners under the name of W. C. Langley & Co.

And also that you do, within thirty days of the service hereof, file or cause to be filed with the clerk of the circuit court for the said district, a notice of severance if you do not desire to be joined with the said Francis L. Markey, Isaac Branch, & Daniel W. Branch as appellants in the prosecution of the said appeal.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States of America, at Charleston, in said South Carolina district, the twenty-seventh day of April, A. D. 1874, and in the ninety-eighth year of the sovereignty and Independence of the United States of America.

PRESSLEY, LORD & INGLESBY,
For Appellants

J. E. HAGOOD,
C. C. C. U. S., Dist. of S. C.

Service of the within acknowledged this twenty-seventh day of April, 1874.

CH. RICHARDSON MILES,
Solicitor for G. H. Sass, assignee of B. F. Evans & H. Cogswell, & for the Kalmia Mills Company & W. C. Langley & Co.
208 J. EDMUND BURKE,
Assignee of B. Mordecai.
WHALEY & MITCHELL,
Solicitors for G. C. Goodrich, Philip Wineman, & John Ashhurst.

And then came into court Ch. Richardson Miles, solicitor for G. H. Sass, assignee, and the Kalmia Mills Co., and J. Edmund Burke, assignee of B. Mordecai, and filed their notice of severance; which notice is in words and of the tenor following:

Notice of severance.

UNITED STATES OF AMERICA,
District of South Carolina:

W. C. LANGLEY & CO.
vs.
F. L. MARKEY & CO. ET AL. } Notice of severance.

G. H. Sass, assignee in bankruptcy of Harvey Cogswell & Benjamin F. Evans, J. Edmund Burke, assignee of Benjamin Mordecai, & The Kalmia Mills Company, defendants in the above-entitled cause, upon whom citation has been served to join with Francis L. Markey, Isaac Branch,
& Daniel W. Branch, appellants, in prosecuting an appeal from
209 the decree of the circuit court of the United States, of the district aforesaid, in the above-entitled cause, hereby file in said circuit court their notice that they are content with the decree of the circuit court and do not appeal therefrom, and do hereby sever from their co-defendants on said appeal.

CH. RICHARDSON MILES,
Solicitor for G. H. Sass, Assignee, and the Kalmia Mills Co.
J. EDMUND BURKE,
Assignee of B. Mordecai.

And then came into court Whaley & Mitchell, solicitors for George C. Goodrich, Philip Wineman, & John Ashhurst, and filed their notice that they unite in appeal; which notice is in words and of the tenor following:

Notice.

THE UNITED STATES OF AMERICA,
South Carolina District, fourth circuit:

W. C. LANGLEY & CO.
vs.
F. L. MARKEY & CO. ET AL.

George C. Goodrich, Philip Wineman, & John Ashhurst, defendants in the above-entitled cause, upon whom citation has been served
210 to join with Francis L. Markey, Isaac Branch, & Daniel W.

Branch, appellants, in prosecuting an appeal from the decree of the circuit court of the United States for the district aforesaid, in the above-entitled cause, hereby file in said circuit court their notice that they are not content with the decree of the circuit court, and do appeal therefrom, and do hereby join with their co-defendants on said appeal.

WHALEY & MITCHELL,
Attorneys.

And on the 27th day of April, A. D. 1874, came into court the said appellants, by Pressley, Lord & Inglesby, their solicitors, and obtained the following order of severance; which order is in words and of the tenor following:

Order of severance.

UNITED STATES OF AMERICA,
South Carolina District, fourth circuit:

W. C. LANGLEY & Co.
vs.
F. L. MARKEY & Co. ET AL. } Order of severance.

On reading the summons to G. H. Sass, assignee, J. Edmund
211 Burke, assignee of B. Mordecai, & The Kalmia Mills Company, to become parties to the appeal in this case from the decree entered on the twenty-fifth day of April, 1874, and the notice of the said defendants declining so to do, on motion of Pressley, Lord & Inglesby, solicitors for appellants, ordered that said appellants Francis L. Markey, Isaac Branch, & Daniel W. Branch have leave to appeal from said decree without joining said G. H. Sass, assignee, J. Edmund Burke, assignee, & the Kalmia Mills Company with them as appellants.

April 27, 1874.

HUGH L. BOND,
Ct. Judge.

And on the 25th day of April, A. D. 1874, came into court the said Francis L. Markey, Isaac Branch, & Daniel W. Branch, by their solicitors, and pray an order allowing appeal; which order is in words and of the tenor following:

Order.

UNITED STATES OF AMERICA:

South Carolina district, fourth circuit. In equity.

W. C. LANGLEY & Co.
vs.
HARVEY COGSWELL ET AL. } Order allowing appeal.

212 F. L. MARKEY & Co.
vs.
W. C. LANGLEY & Co.

In this cause, the defendants Francis L. Markey, Isaac Branch, & Daniel W. Branch pray an appeal to the Supreme Court of the United States, and the court orders and allows the same, upon the defendants

giving bond and security in the sum of three hundred dollars, conditioned to prosecute their appeal with effect, and to pay all costs if they fail to make their appeal good.

April 25th, 1874.

HUGH L. BOND,
Ct. Judge.

And on the 5th day of May, A. D. 1874, came into court the appellants Francis L. Markey, Isaac Branch, & Daniel W. Branch, by their solicitors, and filed the following appeal-bond; which bond is in words and of the tenor following:

Appeal-bond.

W. C. LANGLEY & Co.
vs.
HARVEY COGSWELL ET AL.
F. L. MARKEY & Co.
vs.
W. C. LANGLEY & Co.
} Appeal-bond.

213 UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

OFFICE CLERK OF CIRCUIT COURT.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing one hundred and forty-two pages of written matter and seventy-five pages of printed matter is a true and correct copy of the records and proceedings of the decree in the case of W. C. Langley & Co. against F. L. Markey & Co., the Kalmia Mills, Harvey Cogswell et al., rendered as aforesaid, together with all things relating to the same.

Given under my hand and seal of the said court, at clerk's office in the city of Charleston, within and for the district aforesaid, this the twelfth day of June, A. D. 1874.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. of S. C.

214 Know all men by these presents that we, Francis L. Markey, Isaac Branch, & Daniel W. Branch, as principals, and Samuel Lord and R. M. Marshall, as sureties, are held and firmly bound unto W. C. Langley, Samuel Keyser, & C. D. Cook in the penal sum of three hundred dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Dated at Charleston, this day of April, 1874.

Whereas the above-bounden Francis L. Markey, Isaac Branch, & Daniel W. Branch, in a suit lately depending in the United States circuit court for the district of South Carolina, prayed an appeal from a decree rendered by said court in said suit against them as defendants in the original bill and plaintiffs in the cross-bill filed in said cause, and in favor of said W. C. Langley, Samuel Keyser, & C. D. Cook, plaintiffs in the said original bill and defendants in said cross-bill, and have carried their said appeal to the Supreme Court of the United States:

Now, therefore, the condition of the above obligation is such, that if the above-bounden Francis L. Markey, Isaac Branch, & Daniel
215 W. Branch shall prosecute their said appeal with effect, and pay all costs if they fail to make their said appeal good, then this obligation shall be void; otherwise of force.

D. W. BRANCH, [L. S.]
Per Atty., S. Lord, jr.
F. L. MARKEY, [L. S.]
Per Atty., S. Lord, jr.
ISAAC BRANCH, [L. S.]
Per Atty., S. Lord, jr.
R. M. MARSHAL. [L. S.]
SAMUEL LORD. [L. S.]

In presence of—
J. M. DUKES.

I approve the above bond.

CH. RICHARDSON MILES,
Sol'or for W. C. Langley & Co.

Approved.

GEO. S. BRYAN,
U. S. Judge, Dist. S. C.

5th May, 1874.

(Indorsement on cover:) No. 197. Francis L. Markey, Isaac Branch, and Daniel W. Branch, appellants, vs. W. C. Langley, Samuel Keyser, and C. D. Cook. So. Carolina C. C. U. S. Filed 7th July, 1874.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1875.

F. L. MARKEY & CO., ET AL, APPELLANTS,

vs.

W. C. LANGLEY, & CO., ET AL, APPELLEES.

STATEMENT.

This case comes up on appeal from the Circuit Court of the United States for the District of South Carolina.

The Kalmia Mills, a corporation for manufacturing purposes under the laws of the State of South Carolina, having purchased a large body of lands, and having commenced the 1
erection of a factory and other buildings, had exhausted their means, and found it necessary to borrow the money required to complete their enterprise. This they did by borrowing from W. C. Langley & Co., of New York, in July, 1866, $150,000 upon a mortgage of the entire Mill property and its appurtenances. The notes given for the amounts so borrowed, with interest at seven per cent., were endorsed by B. F. Evans, who was President of the Company, and by H. Cogswell and B. Mordecai, who had already expended large amounts in the enterprise, and the entire responsibility of the management, and 2
for the payment of the debts of the Kalmia Mills devolved upon them.

In October, 1866, an additional loan was made by Langley & Co., and the principal and interest secured in like manner by notes of the Kalmia Mills, endorsed by Evans, Cogswell and Mordecai, and a second mortgage of the entire Mill property. Both these mortgages contained covenants, that if default

should happen to be made in payment of the said notes, it should not be necessary for the mortgagees to apply either to a Court of Law or Equity, for the purpose of foreclosing the said mortgage, but upon such default of payment of either principal
3 or interest, the mortgagees should have full power and authority to put the mortgaged premises into the hands of some good Broker and Auctioneer, to be sold for cash or credit at the option and direction of the mortgagees, at public sale to the highest bidder, according to the custom of vendue, after thirty days advertisement of the time and place of sale, in any one of the newspapers in the City of Charleston and any one in the City of New York; the mortgagees returning the overplus, if any should happen to be from the net proceeds of such sale, all expenses being first deducted, after paying themselves the
4 amounts due upon the said notes, to the said Kalmia Mills; and to effectuate this intent without hindrance from the Kalmia Mills, the partners of the said firm of Langley & Co., and the survivor were made the Attorneys, irrevocable, of the Kalmia Mills, to convey to the purchaser in fee simple with such covenants of warranty as are usually inserted in conveyances of real estate, "and, further, to do and perform all and every other act and acts, thing and things, which shall or may be necessary and proper for the full and complete effecting and performing of the covenants and agreements herein contained."

5 The amount borrowed from Langley & Co. proved insufficient to complete the work, and the parties interested failed to raise additional adequate capital, and default was made in payment of all the notes to Langley & Co.

Langley & Co., on the 16th March, 1867, in pursuance of the powers of sale given them in the mortgages, placed the mortgaged property in the hands of Wardlaw & Carew, brokers of Charleston, and advertised the same for sale on the 23d April, 1867. The first advertisements stated that the "terms, which will be accommodating, will be made known in a future
6 advertisement, and on day of sale." In subsequent advertisements the terms were declared to be one-third cash, remainder on notes at six, nine and twelve months, secured by mortgage of the property.

The Kalmia Mills Company having been unable to raise

money, had incurred debts to a considerable amount and to a great number of individuals, many of them for small amounts, and seems to have been regarded as practically insolvent by its creditors as well as by the three individuals, who were endorsers of the notes to Langley & Co.

Evans, Cogswell and Mordecai, having already spent large amounts upon the enterprise, and being personally bound as 7
endorsers to Langley & Co., determined, in order to save themselves, to become the purchasers of the Mill property, at the sale under Langley & Co.'s mortgages, and thus get rid of the Kalmia Mills Corporation, and make another effort to raise the capital necessary to complete the Factory and thus render the property of greater value. Being advised, as they state in their Answer, that as they were officers of the corporation, it was expedient, if not essential, that they should buy at such a sum as would be sufficient with the other assets of the company to pay all its creditors; they determined 8
to do so, and announced such determination generally to the creditors. Among the creditors of the Kalmia Mills were Markey & Co., Defendants to the original bill and Complainants in the Cross Bill, who were the contractors and builders engaged in erecting the factory, cottages, workshops, etc. This firm had a written contract with the Kalmia Mills, anterior in date to the mortgages to Langley & Co., but which not having been recorded at the time these mortgages were executed, constituted under the existing laws of South Carolina, no lien on the buildings erected by them. Their contract was recorded on the 17th 9
April, 1867, a few days before the sale, and from that date it took effect as a lien upon the buildings erected under it, for the amount justly due, but for no "greater sum than the just value which such buildings and improvements gave to the lands upon which the same were erected;" and not to be "construed to impair any prior lien." A. A., 1816, 6 S. L. 32.

Markey & Co. fearing that if the property was sold for no more than the amount due on the mortgages to Langley & Co., which constituted the first lien, they would not be paid by the Kalmia Mills, consulted counsel, whether they could by judicial 10
proceedings prevent Langley & Co. from selling under the power given to them in the mortgages. Their counsel con-

ferred with the counsel of Langley & Co., and on being informed of the intention of Evans, Cogswell and Mordecai, to become the purchasers at a price estimated by them to be sufficient to pay all the creditors of the Kalmia Mills, and having obtained from these individuals a guarantee that if they became the purchasers they would continue the contract made with them by the Kalmia Mills and indemnify them from any loss from the
11 failure of the Kalmia Mills to pay the amount due on the contract, no objections to the sale were made by them.

Gustavus Volger, from whom the Kalmia Mills had bought a tract of land constituting part of the Mill property, embraced in the mortgages, claimed an equitable lien for the unpaid purchase money, and filed a bill in the Circuit Court for enforcement of his lien, and to enjoin the sale by Langley & Co. Evans, Cogswell and Mordecai, also guaranteed the payment of this debt, and the bill was dismissed. All the other creditors of the Kalmia Mills were notified of the arrangement proposed by
12 Evans, Cogswell and Mordecai, and either acquiesced, or expressed no dissent thereform.

Evans, Cogswell and Mordecai computed that twenty thousand dollars, in addition to the assets of the Company not covered by Langley & Co.'s mortgages, would suffice to pay all the creditors in full: and determined, and announced, that they were prepared to bid for the property at least twenty thousand dollars more than the mortgage debts. This intention they communicated not only to the creditors generally, but also to Langley & Co., explaining to the latter that their purpose was to form a
13 new company, and raise by subscriptions to the capital stock, a sufficient amount to pay off all debts, and to put the Factory into operation; and that, of course, they would be dependent upon their indulgence as to payment, and their aid to enable them to carry out their intention. Langley & Co., without committing themselves to any definite promise of assistance, expressed their willingness to give any reasonable indulgence as to time, provided they gave adequate security. They aver, that their determination to bid a sum which they estimated to be sufficient to pay all the creditors, and their announcement of their intention to the creditors, was based upon the opinion,
14 which they had not heard doubted, that Langley & Co. had the

authority and *power*, as well as the willingness to give to them, if they should be the purchasers, and could give satisfactory security, more favorable terms, as to payment than those formally announced in the subsequent advertisements, to wit: one-third cash, balance in six, nine and twelve months.

The sale was made on the 23d of April, 1867, without objection or protest. At the sale the Auctioneers announced the terms as advertised, and added, that they were authorized to announce that "the purchasers will be able to negotiate more favorable terms with the sellers, provided it is to their mutual interests." 15

Langley & Co., being advised that their right to bid at a sale made by them under a power, was doubtful, to facilitate the payment in full of the mortgage debt due to them, and, as they allege, "to bring the estate to the hammer under every possible advantage"—had the property put up at the amount of the debt due to them. H. Cogswell bid $20,000 over and above that amount, and being the highest and only bidder, the property was set down to him "for and on behalf of himself, Evans, Mordecai, and such other persons as should contribute to the purchase money, and come in and unite with them in the formation of a new company for the purpose of carrying out the contemplated enterprise." 16

The result of the sale being announced to Langley & Co., a personal negotiation was entered into between the senior partner of that firm and Cogswell, Evans and Mordecai, the purchasers. The purchasers represented that they were unable to comply with the requirement of paying one-third of the purchase money in cash, which would have been abont $71,445.69, because they had already exhausted their resources in the ineffectual effort to complete the work; that their entire property outside of what had been invested in this enterprise, consisted of real estate, estimated and believed to be of great value, but upon which they could not raise so large an amount of cash without ruinous sacrifice; that it would require every dollar of the cash which they could hope to raise by subscriptions to the capital stock of a new company to pay the current expenses of completing the work, and they, therefore, asked for one year's indulgence in which to try their experiment; and claimed from 17 18

Langley & Co. that indulgence, the expectation of receiving which had induced them to bid in the property. Langley & Co. reiterated their willingness to give the required indulgence, provided their rights and interests were preserved and protected by additional and adequate security.

This negotiation resulted in a written agreement between the parties, in which were recited the sale and purchase, and that the purchasers were not able to comply with the terms of sale as advertised, by paying one-third of the purchase money
19 in cash; that it was agreed between the parties that Langley & Co. will "grant more liberal terms to the purchasers than those prescribed at the sale, by accepting the notes of the said purchasers for the entire amount of purchase money with interest, without requiring any payment in cash, upon receiving from the said purchasers additional collateral security for the payment of the said notes."

By the first clause Langley & Co. agreed "to accept in payment of the debt due to them this day by the Kalmia Mills under the said mortgages—the following notes of the said
20 Cogswell, Evans and Mordecai, under seal—one note (for the principal of the said debt,) for $180,000, payable on 12 January, 1868, with interest from date; and three other notes (for the interest,) each for $4,779.02 payable at five, six, and seven months, with interest from date; and upon execution and delivery of the said notes, and also of another note for the sum of dollars, which being for an amount over and above the debt of the Kalmia Mills to Langley & Co., is to be assigned by them to the Kalmia Mills, the said Langley & Co., will as the attorney of the Kalmia Mills, execute a
21 conveyance to Harvey Cogswell, in trust, first to pay said notes for the purchase money, and then in trust for such uses as he and the said Evans and Mordecai shall by deed declare, and will enter satisfaction on the two mortgages of the Kalmia Mills, provided that the said Cogswell, Evans and Mordecai shall within a reasonble time, execute to Langley & Co., bonds and mortgages of their individual property, therein specified, conditioned for the payment of all the notes given for the purchase money."

This agreement was carried out, and Langley & Co. received

the five notes stipulated to be given—four for the amount of the mortgage debt—one for $20,000 which was intended to cover the other creditors, including Markey & Co., and which was assigned to the Kalmia Mills, and delivered to Evans, the President, to be held by him for the benefit of the creditors of said company. Evans, Cogswell and Mordecai in pursuance of the agreement also executed to Langley & Co. a Bond for $100,000, in which the foregoing agreement is recited, and the conveyance made by Langley & Co. to Cogswell, in trust, (which will be hereafter mentioned,) and conditioned for the payment of all the amounts which shall remain due upon all the notes given for the purchase money, which are therein set forth, (including the note for $20,000, which had been assigned by Langley & Co. to the Kalmia Mills,) or upon any of them, or upon any renewals of the same, after the property so conveyed in trust shall have been sold, and the proceeds applied to the payment of said notes, and also to pay all such sums as should be thereafter advanced to the obligors by Langley & Co.; and to indemnify and save harmless Langley & Co. from all loss or damage which they shall or may sustain by reason of the insufficiency of the proceeds of the sale of the property so conveyed to Cogswell, as aforesaid, to pay the entire debt due to the said Langley & Co., principal and interest. Mortgages were also executed to Langley & Co. by the same parties, in accordance with the agreement, of their individual property, specified, to secure the Bond of Indemnity.

22 23 24

Notice of the willingness of Langley & Co. to modify the terms of sale was given openly at the sale, but the modifications above stated were made without consultation with, and as far as the evidence shows, without the knowledge of the other creditors.

25

The sale having been effected, Langley & Co., in the exercise of the powers conferred upon them by the mortgages which they held, on the 10th day of May, 1867, executed and delivered a conveyance in fee simple to Harvey Cogswell, of the entire property covered by the mortgages *in trust*, out of and from the purchase money, to pay *first* the costs and expenses of said sale, *then* to pay the several notes given for the purchase money; and subject to the trusts for the payment of the entire amount of the

26 purchase money, to and for such uses, intents and purposes, and to and for such person or persons, and in such shares, estates and proportions, as the said Cogswell, Evans and Mordecai shall by deed, declare, limit and appoint. The deed, also, contained a proviso, that in case of default of payment to the said Langley & Co., of the notes given for the purchase money, or any or either of them, they should sell the mortgaged property without application to any Court, and pay the notes from the proceeds; which deed was duly recorded. The trusts of the deed are set out in full in the Referee's report. Transcript of Record, fol. 126.

27 The purchasers entered into possession under this deed, and carried on work upon the Factory. Markey & Co. on the 11th of June, 1867, entered into an agreement with Cogswell, trustee, whereby it was stipulated that for the work already done and to be done by Markey & Co., they should be allowed and paid the sum of $18,000, and they continued to work under their contract, and received payments from time to time for the work so done. The purchasers paid the debt to Volger, $7,322.25, and discharged several smaller debts due to operatives and other creditors of the Kalmia Mills, in all

28 amounting to $16,674.21. They credited these payments on the $20,000 note, the amount of which had been made up by including the debts thus paid; and it is claimed that the payments should go to the extinguishment of the note, still leaving debts of the Kalmia Mills unpaid amounting to $22,433.08. Many new debts were also contracted by Cogswell, Trustee, in the course of the year during which the effort was made to carry on the enterprise. The purchasers failed in their attempt to form a new company, and none of the notes given by them having been paid, in January, 1868, they requested Langley & Co. to take

29 possession of the entire property conveyed by them to Cogswell, trustee, and to sell the same, and, also, of the individual property mortgaged by them to Langley & Co., and to sell the same, to make up any loss that they might sustain on the sale of the mill property, under the powers given to them. Langley & Co., accordingly under the powers given to them, and in compliance with the prescribed terms, advertised the mill property for sale in Charleston, on the 19th March, 1868.

Opposition was made to the sale by Markey & Co., and other creditors of the Kalmia Mills, and proceedings in the State Court to enjoin the sale were threatened. Langley & Co., thereupon, filed their Bill in the Circuit Court, setting up their rights, 30
and praying injunction against proceedings on the part of the creditors to stop or interfere with the sale. Answers were filed, and Markey & Co. filed a Cross-Bill, praying that the sale by Langley & Co. under their power should be enjoined.

While the cases were under consideration, and before the argument was concluded, the day of sale arrived, and an order was made by consent, that the sale by Langley & Co., under their power should proceed, "provided that the said property, at said sale, be not sold for a sum less than $160,000, and that
$40,000 of the credit portion of the purchase money be retained 31
to stand in place of the property, and subject to the liens and equities of the several parties, and subject to the further order of the Court."

At the sale, William C. Langley purchased at $160,000, and the sale was confirmed by order of this Court, with the same condition and proviso, as to the $40,000, which was made a charge upon the property purchased by him. Subsequently, William C. Langley, having sold the Mill property to the Langley Manufacturing Company, which has since completed the Factory and put it in successful operation; an order was made 32
by the Court releasing the land from the said charge, and substituting instead the bond of Wm. C. Langley, with approved sureties, conditioned for the payment of such portions of the purchase money as should be ordered, not exceeding the sum of $40,000, into Court, whenever he should be ordered so to do.

By order of Court, with the consent of all parties, Langley & Co. proceeded to sell the individual property of Evans, Cogswell and Mordecai, mortgaged to them to secure the Bond of Indemnity. The net amount received by Langley & Co. from these sales was $52,148. 33

By the cases, as presented by the Referee's Report and the Exceptions thereto, four questions were presented for adjudication.

First. What effect was produced on the rights of the parties, by the modification, on the part of Langley & Co., of the terms of sale in 1867?

26 purchase money, to and for such uses, intents and purposes, and to and for such person or persons, and in such shares, estates and proportions, as the said Cogswell, Evans and Mordecai shall by deed, declare, limit and appoint. The deed, also, contained a proviso, that in case of default of payment to the said Langley & Co., of the notes given for the purchase money, or any or either of them, they should sell the mortgaged property without application to any Court, and pay the notes from the proceeds; which deed was duly recorded. The trusts of the deed are set out in full in the Referee's report. Transcript of Record, fol. 126.

27 The purchasers entered into possession under this deed, and carried on work upon the Factory. Markey & Co. on the 11th of June, 1867, entered into an agreement with Cogswell, trustee, whereby it was stipulated that for the work already done and to be done by Markey & Co., they should be allowed and paid the sum of $18,000, and they continued to work under their contract, and received payments from time to time for the work so done. The purchasers paid the debt to Volger, $7,322.25, and discharged several smaller debts due to operatives and other creditors of the Kalmia Mills, in all

28 amounting to $16,674.21. They credited these payments on the $20,000 note, the amount of which had been made up by including the debts thus paid; and it is claimed that the payments should go to the extinguishment of the note, still leaving debts of the Kalmia Mills unpaid amounting to $22,433.08. Many new debts were also contracted by Cogswell, Trustee, in the course of the year during which the effort was made to carry on the enterprise. The purchasers failed in their attempt to form a new company, and none of the notes given by them having been paid, in January, 1868, they requested Langley & Co. to take

29 possession of the entire property conveyed by them to Cogswell, trustee, and to sell the same, and, also, of the individual property mortgaged by them to Langley & Co., and to sell the same, to make up any loss that they might sustain on the sale of the mill property, under the powers given to them. Langley & Co., accordingly under the powers given to them, and in compliance with the prescribed terms, advertised the mill property for sale in Charleston, on the 19th March, 1868.

Opposition was made to the sale by Markey & Co., and other creditors of the Kalmia Mills, and proceedings in the State Court to enjoin the sale were threatened. Langley & Co., thereupon, filed their Bill in the Circuit Court, setting up their rights, 30
and praying injunction against proceedings on the part of the creditors to stop or interfere with the sale. Answers were filed, and Markey & Co. filed a Cross-Bill, praying that the sale by Langley & Co. under their power should be enjoined.

While the cases were under consideration, and before the argument was concluded, the day of sale arrived, and an order was made by consent, that the sale by Langley & Co., under their power should proceed, "provided that the said property, at said sale, be not sold for a sum less than $160,000, and that
$40,000 of the credit portion of the purchase money be retained 31
to stand in place of the property, and subject to the liens and equities of the several parties, and subject to the further order of the Court."

At the sale, William C. Langley purchased at $160,000, and the sale was confirmed by order of this Court, with the same condition and proviso, as to the $40,000, which was made a charge upon the property purchased by him. Subsequently, William C. Langley, having sold the Mill property to the Langley Manufacturing Company, which has since completed the Factory and put it in successful operation; an order was made 32
by the Court releasing the land from the said charge, and substituting instead the bond of Wm. C. Langley, with approved sureties, conditioned for the payment of such portions of the purchase money as should be ordered, not exceeding the sum of $40,000, into Court, whenever he should be ordered so to do.

By order of Court, with the consent of all parties, Langley & Co. proceeded to sell the individual property of Evans, Cogswell and Mordecai, mortgaged to them to secure the Bond of Indemnity. The net amount received by Langley & Co. from these sales was $52,148. 33

By the cases, as presented by the Referee's Report and the Exceptions thereto, four questions were presented for adjudication.

First. What effect was produced on the rights of the parties, by the modification, on the part of Langley & Co., of the terms of sale in 1867?

Second. What is the relative rank of the $20,000 note and the notes retained by Langley & Co., which, together, made up the purchase money at the sale in April, 1867?

34 *Third.* How shall the amount of the proceeds of sale, which the $20,000 is entitled to receive, be distributed?

Fourth. What are the rights of Markey & Co. under their mechanic's lien?

The Referee reported, that Langley & Co. having no right as Trustees, after the sale was made, to modify the terms, or give indulgence to the purchaser, but having the right to control their own interest only, when they contracted to give more favorable terms to an approved purchaser could do so only out of the proceeds of the purchase money coming to them—

35 and that when in pursuance of their contract they did actually modify the terms, they must be construed to have done so out of, and at the risk of that portion of the purchase money, which was allotted to them. That this was the opinion of Langley & Co. themselves, for, upon making this modification, they took a bond of indemnity to themselves. If they had made the modification of the terms of sale as agents of the mortgagor, (the position they occupied under the power of sale in the mortgage,) and as custodians of the interests of the other creditors, as well as of themselves, the bond of indemnity would have de-

36 clared this. But it was personal to them and was evidently intended to protect them and none other from the consequences of their own act. He, therefore, recommended, that as $40,000 of the purchase money had been reserved, to meet the result of these cases, this sum should be applied to the satisfaction of the amount due on the note for $20,000 and the remainder returned to Langley & Co.

Langley & Co. excepted to the decision of the Referee on this point.

The next question considered in the report was whether, by

37 the deed of conveyance to Cogswell in trust, the notes representing the debt of Langley & Co. are to be postponed in the distribution of the proceeds of sale of 1868, made under that deed, to the note of $20,000, which was dedicated to the payment of the other creditors, or, are all the notes to be paid *pari passu*, or, are Langley & Co. entitled to be first paid.

The Referee reported that Langley & Co. had never intended by any act on their part, or by the deed to Cogswell, to waive or surrender their priority; that they did not accept the notes of the purchasers in payment of the debt due to them by the Kalmia Mills, and, therefore, that the note for $20,000 did not take rank *pari passu* with the notes for the rest of the purchase money secured by the trusts of the deed to Cogswell. 38

Markey & Co. excepted to the ruling of the Referee on this point.

The third question was as to the distribution of the proceeds of the note for $20,000. Are all the creditors equally interested therein, and entitled to a distribution *pro rata* of the money derived therefrom, or had the Kalmia Mills Company, or Cogswell, Trustee, the right to pay such of the creditors as they might select, and credit the amounts thus paid on the note. 39

The Referee reported that the note for $20,000 was dedicated to the payment of the claims of the general creditors; that each creditor had an interest in the note; that Markey & Co. had a prevailing lien upon the fund represented by this note and that the proceeds, therefore, should first be applied to the payment of their claim; and he refused to allow the amounts paid to the creditors of the Kalmia Mills, by Cogswell, Trustee, to be credited on the note.

To this ruling Langley & Co. excepted.

The case came on for a hearing upon the Referee's report and the exceptions thereto, before the Circuit Court for the District of South Carolina, in April, 1871, and on the 18th April, 1872, the Court made the following 40

DECREE.

These cases, being a bill and cross-bill, came up and have been argued upon the report of a special referee, and exceptions thereto.

By the referee's report, and the exceptions thereto, four questions are presented for adjudication: 41

First. What effect was produced on the rights of the parties by the modification on the part of Langley & Co. of the terms of sale in 1867?

Second. What is the relative rank of the $20,000 note, and the notes retained by Langley & Co., which together made up the purchase-money at the sale in April, 1867?

Third. How shall the amount of the proceeds of sale, which the $20,000 note is entitled to receive, be distributed?

Fourth. What are the rights of Markey & Co. under their
42 mechanic's lien?

These are all involved in the general question, how shall the purchase-money of the property bought by William C. Langley at the sale on 19th March, 1868, be applied? Langley & Co. claim that they are entitled to be paid in full out of the proceeds of sale, before any other creditors of the Kalmia Mills, or of the purchasers at the sale of 1867 shall receive any portion thereof, because they had the prior and paramount lien on the said property by virtue of their mortgages, and that their right upon the fund derived from the sale of the property under their
43 mortgages is as complete as it was in the land. Markey & Co., and the other creditors of the Kalmia Mills interested in the note for $20,000, given by the purchasers at the sale of 1867, and appropriated to the payment of their debts, deny the right of Langley & Co. to priority of payment, but insist that the proceeds of the sale of 1868 must be applied first to the payment of this note in full. They contend that had the terms of the sale of 1867, as advertised, been carried out, one-third of the bid would have been paid in cash, and the whole property would have been mortgaged to secure the remainder of the pur-
44 chase-money, which would have been ample security. That the property having been sold in 1867 for two hundred and fourteen thousand three hundred and thirty-seven 04-100 (214,337.-04) dollars, brought in 1868 one hundred and sixty thousand (160,000) dollars; and that if Langley & Co. had not burdened it with the payment of the cash portion, seventy-one thousand four hundred and forty-five 69-100 (71,445.69) dollars, there would have been quite enough to pay in full the credit portion in which their twenty thousand dollar note was included. They insist, therefore, that Langley & Co, must bear
45 this loss, because the modification of the terms of sale, made by Langley & Co,, was beyond their power and authority, and in violation of their duty as trustees to sell, and was made without

their knowledge or consent; and because Langley & Co. demanded and received indemnity for the modifications.

This position is sustained by the special referee, who holds that the effect of the modification of the terms of sale is the postponement of the $71,445.69, which should have been paid in cash, to the amount of $142,891.38 to be secured by notes, including the $20,000 note provided for the general creditors. At the second sale the property brought $160,000; and the referee recommends that as $40,000 of the purchase-money has been reserved to meet the result of these cases, this sum be applied to the satisfaction of the amount due on the note for $20,000, and the remainder returned to Langley & Co. 46

Langley & Co. except to the decision of the referee on this point, and insist that the arrangement made by them with the purchasers at the sale of April. 1867, by which indulgence as to payment was given, did not impair or disturb their lien and right to priority of payment out of the purchase money; but that in making it they acted as agents of the mortgagors, in pursuance of their power, and that if loss ensued, it must fall upon their principal, or the creditors of the principal subsequent to themselves, and not upon them: 47

1. Because the said arrangement was made in pursuance of the express power given them in the mortgages under which the sale was made.

2. Because the arrangement procured the bid for the property over and above the mortgage-debt; was necessary to secure the advantageous sale which had been made; was for valuable and adequate consideration, viz, the mortgage of additional property to secure the payment of the entire purchase-money; was intended and was well calculated to protect the rights and further the interests of all creditors of the Kalmia Mills subsequent to themselves; and was, therefore, in accordance with their duty as agents and attorneys of the mortgagor, and trustees under mortgagors with power of sale; and would have been sanctioned by the Court if application had then been made to confirm it. 48

3d. Because the said arrangement was sanctioned or acquiesced in by all the creditors of the Kalmia Mills, especially by Markey & Co. 49

Second. What is the relative rank of the $20,000 note, and the notes retained by Langley & Co., which together made up the purchase-money at the sale in April, 1867?

Third. How shall the amount of the proceeds of sale, which the $20,000 note is entitled to receive, be distributed?

Fourth. What are the rights of Markey & Co. under their
42 mechanic's lien?

These are all involved in the general question, how shall the purchase-money of the property bought by William C. Langley at the sale on 19th March, 1868, be applied? Langley & Co. claim that they are entitled to be paid in full out of the proceeds of sale, before any other creditors of the Kalmia Mills, or of the purchasers at the sale of 1867 shall receive any portion thereof, because they had the prior and paramount lien on the said property by virtue of their mortgages, and that their right upon the fund derived from the sale of the property under their
43 mortgages is as complete as it was in the land. Markey & Co., and the other creditors of the Kalmia Mills interested in the note for $20,000, given by the purchasers at the sale of 1867, and appropriated to the payment of their debts, deny the right of Langley & Co. to priority of payment, but insist that the proceeds of the sale of 1868 must be applied first to the payment of this note in full. They contend that had the terms of the sale of 1867, as advertised, been carried out, one-third of the bid would have been paid in cash, and the whole property would have been mortgaged to secure the remainder of the pur-
44 chase-money, which would have been ample security. That the property having been sold in 1867 for two hundred and fourteen thousand three hundred and thirty-seven 04-100 (214,337.-04) dollars, brought in 1868 one hundred and sixty thousand (160,000) dollars; and that if Langley & Co. had not burdened it with the payment of the cash portion, seventy-one thousand four hundred and forty-five 69-100 (71,445.69) dollars, there would have been quite enough to pay in full the credit portion in which their twenty thousand dollar note was included. They insist, therefore, that Langley & Co, must bear
45 this loss, because the modification of the terms of sale, made by Langley & Co,, was beyond their power and authority, and in violation of their duty as trustees to sell, and was made without

their knowledge or consent; and because Langley & Co. demanded and received indemnity for the modifications.

This position is sustained by the special referee, who holds that the effect of the modification of the terms of sale is the postponement of the $71,445.69, which should have been paid in cash, to the amount of $142,891.38 to be secured by notes, including the $20,000 note provided for the general creditors. At the second sale the property brought $160,000; and the referee recommends that as $40,000 of the purchase-money has been reserved to meet the result of these cases, this sum be applied to the satisfaction of the amount due on the note for $20,000, and the remainder returned to Langley & Co. 46

Langley & Co. except to the decision of the referee on this point, and insist that the arrangement made by them with the purchasers at the sale of April. 1867, by which indulgence as to payment was given, did not impair or disturb their lien and right to priority of payment out of the purchase money; but that in making it they acted as agents of the mortgagors, in pursuance of their power, and that if loss ensued, it must fall upon their principal, or the creditors of the principal subsequent to themselves, and not upon them: 47

1. Because the said arrangement was made in pursuance of the express power given them in the mortgages under which the sale was made.

2. Because the arrangement procured the bid for the property over and above the mortgage-debt; was necessary to secure the advantageous sale which had been made; was for valuable and adequate consideration, viz, the mortgage of additional property to secure the payment of the entire purchase-money; was intended and was well calculated to protect the rights and further the interests of all creditors of the Kalmia Mills subsequent to themselves; and was, therefore, in accordance with their duty as agents and attorneys of the mortgagor, and trustees under mortgagors with power of sale; and would have been sanctioned by the Court if application had then been made to confirm it. 48

3d. Because the said arrangement was sanctioned or acquiesced in by all the creditors of the Kalmia Mills, especially by Markey & Co. 49

After careful consideration of the facts and arguments the judgment of the Court is, that these positions of Langley & Co. are all supported by the facts as reported, and by reason and authority; and sustain the arrangement made by them with the purchasers at the sale of 1867, as within the scope of their power, authority, and duty, as mortgagees, with power to sell and apply the proceeds to the payment of their debt; was binding upon all parties; and their right to priority of payment
50 out of the purchase-money, represented by the notes of the purchasers, when collected, was not waived or unpaid.

Upon the second question the referee holds that the note for $20,000 does not take rank *pari passu* with the notes for the rest of the purchase-money secured by the trusts of the conveyance to Cogswell. Markey & Co. except to the decision of the referee on this point. The Court concurs in the judgment of the referee on this question.

It has been further contended by the counsel of Markey & Co. that although Langley & Co. may have done nothing to de-
51 stroy their right to priority of payment from the proceeds of sale of the mill-property, yet they can have no such right as to the proceeds of sale of the individual property never before mortgaged, unless they look to that wholly for their cash portion.

It has already been adjudged that Langley & Co., as mortgagees, with power of sale, had the right to make the arrangement which they did with the purchasers, and did not thereby lose or waive their right to be paid in full before any other creditor. The conveyance to Cogswell in trust to pay the notes
52 for the purchase-money was part of the same arrangement, and secured the payment of the creditors entitled to said purchase-money without disturbing their respective priorities. They were entitled to preserve their right to be first paid out of the additional security which they required, any balance remaining due to them after exhausting the proceeds of the mill-property, before any other creditor was paid therefrom. The agreement between Langley & Co. and the purchasers, the bond of indemnity, and the mortgages of individual property securing it, and the trust deed to Cogswell, are parts of one arrangement, which
53 effectually secures the payment of Langley & Co., the creditors

having the paramount lien, in preference to every other creditor. Langley & Co. under each and every of these instruments are made the agents, attorneys, and trustees, to sell the property, and to pay themselves from the proceeds, and are only to account for the surplus after the payment of all expenses and their debt.

The third and fourth questions will be considered together.

The payments made by Harvey Cogswell, trustee, after the sale of 1867, to certain creditors of the Kalmia Mills, were all of debts, which were intended to be covered by the note for 54
$20,000, the amount of which had been made up by including the debts thus paid. These creditors whose debts are embraced in the $20,000, for which said note was given, have therefore in fact, been paid, and the note extinguished, *pro tanto*, as much as if separate notes had been given for each debt so paid, and had been cancelled, and the amounts so paid cannot be paid again. The money so used having been paid by Cogswell, trustee, the debtor of Langley & Co., from funds out of which Langley & Co., as the creditor holding the prior and paramount lien, had the legal and equitable right to require payment, would enure 55
to their benefit, and they would be entitled to be subrogated to the rights of the said Cogswell, and of all the creditors who were thus paid, and to receive the benefit of the dividend on the $20,000 note to which they or any of them would be entitled, had their claims not been so paid.

But as Langley & Co. have been adjudged to be entitled to be first paid the entire amount due to them, before any payment is made on the $20,000 note, which represents debts due to creditors subsequent to them, it will only be in the event of their remaining a surplus of the purchase-money bid by William 56
C. Langley, at the sale of the mill property in 1868, or from the proceeds of the sale of the individual property sold by Langley & Co., under the mortgage given to secure the bond of indemnity (which have been adjudged to stand upon the same footing) after the payment of Langley & Co. in full, that the question submitted by the referee will arise: whether the amounts so paid by Cogswell must go to reduce proportionably the amount due on the note, or which of the creditors, subsequent to Langley & Co., are entitled to be subrogated to the rights of the creditors so paid, because of their having been 57

entitled to be first paid before the creditors so paid by Cogswell, trustee.

The referee reports that Markey & Co. had a valid lien on a portion of the property of the Kalmia Mills by virtue of their mechanic's contract, subsequent to Langley & Co.'s lien; and that no other creditor than these two firms had any lien on the property.

Markey & Co., as the creditors next in rank and priority to
58 Langley & Co., will, in the event of their being a surplus to be applied to the $20,000 note, have the right of subrogation to which Langley & Co. would have been entitled, if this note was to be paid *pari passu* with the notes given for their debt; and after Langley & Co. have been paid in full, will be entitled to the same right as they would have had. It is therefore adjudged that Markey & Co. have a prevailing lien upon any surplus remaining after payment of Langley & Co., which is to be appropriated to this note, and the same shall be first applied to the payment of their claim before it is applied to the payment of
59 the general creditors without lien.

The lien of Markey & Co., by virtue of their mechanic's contract, which has been transferred to the proceeds of sale, was a lien only upon the buildings erected by them under their contract for the amount justly due, but for no greater sum than the just value which such buildings gave to the lands upon which they were erected.

The creditors of Harvey Cogswell, trustee, after the sale of April, 1867, are sufficiently represented by the defendants, Goodrich, Wineman & Co., and the assignees in bankruptcy of Cogs-
60 well, Evans and Mordecai, are not necessary parties.

It is ordered, adjudged, and decreed that the exceptions to the report of the special referee taken by Markey & Co. be overruled, and that the exceptions to said report taken by W. C. Langley & Co. be sustained.

It is further ordered that the cases be referred back to the special referee, to make the calculations and apportionments necessary, and to take and state the accounts according to the principles of this decree.

18th April, 1873. HUGH L. BOND,

61 *Circuit Judge.*

On the 18th April, 1874, the Referee filed his report, showing as the result of the account taken under the decree of April, 1873, that after crediting upon the debt due to Langley & Co., the whole amount realized by them from the sales of the entire property, made under the order of this Court, there remained due them a balance of $6,152 13-100.

On the 25th April, 1874, the Court made a final decree, whereby, after reciting the Referee's report, the discharge in bankruptcy of Evans, Mordecai and Cogswell, it ordered the report to be confirmed. 62

The bond entered into by Langley, to the Clerk of the Court, to be cancelled.

The Cross Bill of Markey & Co. to be dismissed.

We agree to the above statement of facts.

PRESSLEY, LORD & INGLESBY,
Attorneys for Markey & Co.
C. R. MILES.
Attorney for W. C. Langley & Co.

ASSIGNMENT OF ERRORS.

1. That the Circuit Court erred in holding that the arrangement made by Langley & Co., after the sale of April, 1867, whereby indulgence was given to the purchasers, was within the scope of their authority and duty, was binding upon all the creditors of the Kalmia Mills, and did not impair their right to priority of payment out of the proceeds of the second sale. 63

2. That the Court erred in holding that all the creditors, and especially Markey & Co. had sanctioned or acquiesced in the arrangement, made by Langley & Co. with the purchasers.

3. That the Court erred in holding that the $20,000 note did not rank, *pari passu*, with the other notes, secured by the trusts of the conveyance to Cogswell. 64

4. That the Court erred in holding that payments made by Cogswell to certain creditors, whose debts were embodied in the $20,000 note, extinguished said note *pro tanto*.

ABSTRACT OF PLEADINGS.

The bill sets forth the mortgages to Langley & Co.—the powers to sell contained therein—the default of payment, the sale to Cogswell, the deed of conveyance to the purchasers, the execution of the notes for the purchase money, their delivery
65 to Langley & Co., and the assignment of the $20.000 note to B. F. Evans, as President of the Kalmia Mills, to be held by him for the benefit of the creditors of the said Kalmia Mills other than Langley & Co. As to the agreement made after the sale, the bill uses this language:

"And your orators further show unto your Honors, that cotemporaneously with the execution of the said deed of conveyance to Harvey Cogswell, your orator entered into an agreement with the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, the purchasers of the property; to the
66 effect, that inasmuch as the terms of sale upon which the mortgaged property was advertised, were one-third cash, balance in six, nine, and twelve months, secured by mortgage of the property; and it had also been announced at the said sale that more accommodating terms might be had by approved purchasers; and your orators were authorized and empowered to sell for cash, or on credit, at their option, and were entitled to be the first paid from the proceeds of sale; and the creditors of the said Kalmia Mills other than your orators, therefore, not being entitled to receive any portion of the cash, if any cash should be required;
67 and the purchaser of the property not being able to pay the one-third cash required by the terms of sale, your orators were willing, and consented in pursuance of their power, and in the exercise of their discretion, to waive their right to a payment of one-third cash, and also to the payment of the balance of the credit portion of the purchase money to which they were entitled, in six and nine months; and to extend the time for the payment of so much of the purchase money as they were entitled to receive, leaving the twenty thousand dollars ($20,000) of the purchase money over and above their debt, to be paid in
68 twelve months from the day of sale, according to the terms as advertised, upon condition that the parties for whom the property was purchased should give to your orators collateral secu-

rity in addition to the security of the property itself; which agreement was reduced to writing, and signed by your orators and the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai; and is in the hands of your orators' Solicitor, ready to be produced to this Honorable Court, if it shall be required."

The bill then sets forth the execution of the bond of indemnity, and the mortgages of the individual property given to 69
secure it—the subsequent default in the payment of the notes, and the necessity of an immediate sale—the intention of Langley & Co. to sell under their power, and the threatened interference of Markey & Co., and the other creditors, through proceedings in the State Court.

It then proceeds as follows:

"And your orators further show, that they are not fully and accurately informed of the particulars of the claim set up by the said F. L. Markey & Co., but they are informed and believe, and so distinctly charge, that your orators' rights, under the 70
conveyance from the Kalmia Mills to Harvey Cogswell, hereinbefore fully stated, to have the property embraced in the said deed sold, and the proceeds of sale applied to the payment and extinguishment of the debt due to them upon the promissory notes held by them, and the payment of which is secured by the express terms of said deed, is paramount to the claims of all other creditors of the said Kalmia Mills, or creditors of the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai.

And your orators are further informed and believe, and so 71
charge, that the original contract was made with the said F. L. Markey & Co., by the Kalmia Mills, and was subsequent to the mortgages to your orators, by the said Kalmia Mills, under which the sale of the twenty-third of April, 1867, was made; that the amount due by the said Kalmia Mills to the said Markey & Co., at the time of that sale, was included in and embraced in the twenty thousand dollars bid by the said Harvey Cogswell, over and above the mortgage debt of your orators, for which a separate note was given, and assigned by your orators to the said Kalmia Mills, as hereinbefore stated. That 72
at the time of said sale, the said F. L. Markey & Co., expressly

acknowledged that they had no lien upon the said property, by requiring and accepting from the said Harvey Cogswell, Benjamin F. Evans, and Benjamin Mordecai, a personal guarantee of their contract with the Kalmia Mills, and their personal indemnity against loss thereby; that whatever contract may have been made by the said F. L. Markey & Co., subsequent to the sale of the twenty-third of April, was made with the express notice and full knowledge of the state of the title to the property, and that it was held by the said Harvey Cogswell only upon *trust, first* to pay to your orators the full amount of the debt due to them; and that any such contract could only create a personal obligation on the part of the said Harvey Cogswell, and such other persons as made the said contract, as he or they had no right or power to encumber or charge the property held by him, in trust, to pay the debt due upon it to your orators; and could not give a lien which could interfere with the prior right and equities of your orators.

* * * * * * *

And your orators say that they are entitled to have the aid of this Court in enforcing their rights, under the conveyance of the 10th May, 1867, and in completing the sale of the property under the power therein contained, * * * * in order that your orators may be paid in accordance with the trusts of said deed."

The prayer of the bill is that the priority of Langley & Co. might be declared and established; that the sale directed by the complainants might be protected, and that Markey & Co. might be enjoined from interfering therewith, and that the surplus of the sales money, if any, after payment of Langley's debt, should be distributed under the order of Court.

THE ANSWER OF MARKEY & CO.,

Sets up their agreement with the Kalmia Mills; alleges that it was duly recorded on the 17th April, 1867, and from that time constituted a valid and binding lien, superior to all other liens, except the mortgage of Langley & Co., upon the buildings erected and improved by them; admits that subsequent to the making of the contract with them, but prior to the recording of

the same, the Kalmia Mills executed to the complainants the mortgages described in their bill; that in April, 1867, Langley 76
& Co., in pursuance of the power contained in the mortgages, placed the entire Kalmia Mills property in the hands of Wardlaw & Carew; that thereupon, they notified the solicitor of Langley & Co. of their intention to institute the necessary proceedings to enjoin the same; that, after considerable negotiations, an agreement was entered into that Evans, Mordecai and Cogswell should bid a sufficient amount at the proposed sale to cover the indebtedness of the company to Langley and its other outstanding liabilities, estimated at $20,000; that Evans, Mordecai and Cogswell undertook, in the event of their purchasing the pro- 77
perty, to guarantee the performance of their contract; that this guarantee was regarded by them as an additional security, and deny that they ever agreed to waive their lien on the mortgaged property; that in consequence of this arrangement, opposition to the sale was withdrawn, and the property was sold to Cogswell, as stated in the bill.

They admit that by this sale their lien was discharged, and insist that the mortgage of Langley & Co. was also discharged, and that both claims were put upon the same footing in the trust deed; that after the sale, Langley & Co. without consulta- 78
tion with them, or any of the other creditors of the Kalmia Mills, undertook to vary the terms of the sale, and waived the payment of the cash portion of the purchase money.

They insist that this act tended to their manifest wrong and injury, inasmuch as the debt, with which the said property was encumbered, was thereby greatly increased, and its value, as a security for the payment of their claim, was proportionably diminished. They, therefore, claimed that if the said property, upon a future sale, should prove inadequate to pay the whole amount of the said notes given by the said Cogswell, Evans and 79
Mordecai, then that the said note for $20,000 should be first paid out of the proceeds of said sale, and any loss which may ensue from the insufficiency of said property should be borne by the said Langley & Co., to the extent that such deficiency has been caused by the unauthorized waiver, on the part of Langley & Co., of the payment of the cash portion of the purchase money. That at the time of the sale to Cogswell it was

distinctly understood, and was so expressed in the trust deed, that the purchasers should go on and complete the mill and
80 other buildings then in course of erection; and accordingly, on the 11th day of June, 1867, an agreement was entered into whereby it was stipulated that for the work already done, and to be done by the defendants, they should be allowed and paid by the trustee the sum of $18,000, and in consideration thereof defendants agreed to do certain work therein specified, which was necessary to the completion of the factory; that this agreement was executed, and was recorded on 8th August, 1867. That, from the time of making the contract, defendants continued to work under said agreement as long as the means of the
81 other contracting parties enabled them to carry on the work.

That the property held by Cogswell, trustee, cost, together with the improvements, nearly or quite $400,000; and, upon a fair market and proper advertisement, could be readily sold at a price sufficient to satisfy all the claims upon it.

THE ANSWER OF HARVEY COGSWELL

Admits that all the allegations in the bill are within his personal knowledge, and are true and accurate. He admits to be true all the statements in relation to the sale of the 23d April, 1867, of his purchase at said sale, of the agreement between the said W.
82 C. Langley & Co. and defendant, and his associates in the purchase of the property, the conveyance to defendant in trust, the bond of indemnity and mortgages, and defendant says that he believed at the time of entering into said agreement, and executing said several instruments, that he was securing to the said W. C. Langley & Co. the first lien upon all the said property, and that the claims of all other creditors of the Kalmia Mills and of defendants, and the other purchasers of said property, were subsequent to and subject to the said prior right and lien of the said W. C. Langley & Co.

83 That he believes that when the contract was made with Markey & Co. after the sale of 23d April, 1867, the said Markey & Co. had full and exact knowledge of the state of the title of the mill property, and that the same was held by deponent in trust, first to pay the debt to Langley & Co.; and that Markey

& Co. entered into an agreement and contract knowing that they had to look to the individuals who had purchased the property for payment, and that they had no lien on the said property until the prior lien of the said Langley & Co. should be first satisfied.

THE ANSWER OF BENJAMIN F. EVANS

Admits that the statements contained in the bill are all within 84
his personal knowledge, and are true and accurate. The statements in the answer deemed necessary to be set forth are, that the $20,000 note was assigned to him by Langley & Co., as President of the Kalmia Mills, and was, when his answer was filed, still held by him in trust for such of the creditors of the Company as might be held to be entitled thereto.

That he, with Mordecai and Cogswell, being individually responsible for the entire debt to Langley & Co., by reason of the endorsement of the notes, determined to bid in the property at the
sale for their own protection, provided they could arrange the 85
terms with said Langley & Co., who had given express notice at the sale, that more favorable terms than those advertised would be given to approved purchasers.

That the note for $20,000, which represents the excess of the purchase money over the mortgage debt, and held by defendant, constitutes a lien on the property subsequent to the lien of Langley & Co., and that the rights of these creditors will be protected by the payment into Court of the surplus of the purchase money after payment of Langley & Co.

That after the sale and conveyance to Cogswell, a long nego- 86
tiation was held by Markey & Co., with Cogswell, Mordecai and himself, which resulted in a new contract between the parties, which was recorded.

And he distinctly and positively affirms that the said Markey & Co. at the time of making the contract had full, exact, and express notice of the condition of the title to the property, and that it was held by Cogswell upon the express trust to pay the expenses of sale; next, the notes to Langley & Co., and lastly, the note to the Kalmia Mills, with power in said Langley & Co. to sell the entire property upon default of payment of any 87
of the notes, and that they, Markey & Co., had to rely only upon

the individual credit of the purchasers. That these facts were not only expressly and repeatedly stated to the said Markey & Co., by this defendant, but the individual partners of said firm repeatedly alluded to and recognized them to the defendant in various way, and especially by proposing to the defendant, that in order to help him in raising a new company to complete and carry on the mills, they would subscribe as stock to such new company the entire amount due and to become due on their con-
88 tracts with the Kalmia Mills, and Cogswell, trustee; as they feared, that if defendant could not induce others to join in a new company, the whole property would again be sold, and that as the lien of Langley & Co. had to be first satisfied, they would have to come on the individual property of Cogswell, Mordecai, and defendant, and that they would very reluctantly be the means of injuring Cogswell and defendant to the extent of enforcing against their private property a claim of their's, originating in and caused by the efforts of Cogswell and defendants to build the mills.

89 THE ANSWER OF BENJAMIN MORDECAI

Admits that the statements of the bill are all within his personal knowledge and are true and accurate, and that complainants are entitled to the relief prayed.

THE ANSWER OF THE KALMIA MILLS

Admits the facts stated in the bill, and admits that the $20,000 note was assigned to the Company and was held by its President, in trust for such of its creditors as were entitled thereto.

The answer of the other defendants, Goodrich, Wineman & Co., contains nothing material to the issues now involved in the
90 case.

THE CROSS BILL OF MARKEY & CO.

Sets out substantially the facts as stated in their answer. The bill charges that the arrangement made with the purchasers, after the sale was made, without the knowledge or consent of the complainants, and tended to their manifest wrong and injury, and

insisted that if the property, upon a future sale should prove inadequate to pay the entire debt, that the $20,000 note should be first paid, and that any loss which might ensue from the insufficiency of the property to pay all the notes should be borne by Langley & Co., to the extent that the dificiency had been caused 91
by the unauthorized waiver on the part of Langley & Co. of the payment of the cash portion of the purchase money. The bill further charges, that Langley & Co., well knowing that to charge the cash portion of the purchase money upon the mill property, would be a fraud upon the rights of the complainant and other creditors of the Kalmia Mills, had taken the bond of indemnity and the mortgage to secure the same, more particularly set forth in the original bill.

It states, the contract entered into on the 11th of June, 1867, as stated in the answer, and their working under it as long as 92
the parties were able to carry on the work: and prays that Langley & Co. may be compelled to exhaust the private property, mortgaged to them, and the personal property covered by their mortgages, before resorting to the real estate, upon which alone the complainants have a lien; that the said Kalmia Mills be directed to deliver up to the proper officer of this Court the separate note for $20,000, assigned to them by the said Langley & Co., and that the same may be collected and the proceeds applied in the first instance to the payment of any balance due to the complainants, under the contract entered into between the 93
Kalmia Mills and themselves, on the 27th April, 1866, and then to the satisfaction of the other creditors of the Kalmia Mills; and that all the property embraced in the trust deed may be sold by an order of this Court, at such times and on such credit and in such parcels as may be most for the interest of all concerned therein, and that the proceeds of such sale or sales may be distributed amongst the several claimants who may be called in under the order of the Court, according to their respective rights and priorities.

THE ANSWER OF LANGLEY & CO. 94

Sets forth the sale of April, 1867, and the terms thereof; and then alleges that the agreement entered into with the purchasers after the sale, was made in pursuance of what they were advised

was within their power and discretion, and they never conceived that said agreement could be construed as a waiver or postponement of their distinct prior lien upon all the property of the Kalmia Mills, sold under said mortgages, and their first lien upon the individual property of the said purchasers; that, on the contrary, they believed, and were advised, that the said
95 agreement, the conveyance to Harvey Cogswell, in trust, on the 10th May, 1867, and the bond of indemnity and mortgages executed by the said purchasers, all distinctly expressed and enforced, in a legal manner, this, their prior right and lien; and these defendants say that if these said several instruments are in any degree or manner defective and deficient in the full, exact, and legal expression of this their right, and according to their strict and technical import, do not protect and effect the same, that then the same were executed and assented to by these defendants in ignorance and mistake of facts, and they pray to
96 be relieved by this honorable Court, as a Court of Equity, having power so to do, from the strict legal effect of said instrument, so far as the same is contrary to their true and equitable meaning and intent, to wit: to secure to these defendants the continuance of their acknowledged priority over all other creditors of the said Kalmia Mills, and of the purchasers of the property. And they deny that the bond of indemnity and mortgages of the said Cogswell, Evans and Mordecai were given for the purpose stated in the Cross-Bill, or that they were intended for any other purpose than that which
97 is stated in complainants' original Bill, as an additional security to these defendants for the repayment of the money loaned by them originally to the Kalmia Mills, upon the endorsement of the three individuals before named and the mortgages of the property; that the said additional security will operate for the benefit of the complainants and other creditors, provided the property so mortgaged shall sell for more than enough to pay the balance of the debt which now remains due to these defendants, after applying the proceeds of the sale of the mill property thereto.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1875.

No. 197.

F. L. MARKEY & CO., ET AL., APPELLANTS,

vs.

W. C. LANGLEY & CO., ET AL., APPELLEES.

Brief of Pressley, Lord & Inglesby, for Appellants.

The first question which we have now to consider is the effect which the arrangement made by Langley & Co., with the purchasers, after the first sale, had upon their rights and interests. 1
Did it operate to defeat their right to priority of payment from the proceeds of the second sale, made under the trust deed given to secure payment of the purchase money of the first sale? To determine this question it is necessary to consider the position and character which Langley & Co. filled at the time the arrangement was made, and their relation to the other parties interested in the property. The title to this property was in the Kalmia Mills. Langley & Co. were the first and largest creditors of the Kalmia Mills, and had a paramount lien upon the entire mill property. They were also mortgagees, with power to 2
sell upon default of payment, without resort to any Court. They were, however, not the only incumbrancers. At the time of the first sale the premises were bound by the mechanics' lien of Markey & Co. The property having brought enough at the first sale to pay both of these debts, the liens were transferred to the fund, and continued upon it, in the same order in which

they had subsisted upon the premises before the sale. Such is the settled rule in equity, and the mortgagees having been notified of the subsequent lien, were bound to apply the fund as a
3 Court of Equity would have applied it.

Olcott *vs.* Bynum, 17 Wallace, 63.

The appellants insist that Langley's control over the terms of sale ended when the property was knocked down to Cogswell, except for the purpose of executing a conveyance and receiving the purchase money. This depends upon the meaning and effect of the power of sale contained in the deed. It is in these words:

"That if default should happen to be made in payment of
4 the said notes, that it should not be necessary for the mortgagees to apply either to a Court of Law or Equity—for the purposes of foreclosing the said mortgage—but upon such default of payment of either principal or interest the mortgagees should have full power and authority to put the mortgaged premises into the hands of some *good broker and auctioneer*, to be sold for cash or credit, at the option and direction of the mortgagees, at public sale, to the highest bidder, according to the custom of vendue, after thirty days advertisement of the time and place of sale in any one of the newspapers in the City of Charleston, and
5 any one in the City of New York."

All the authorities concur in saying that this power must be strictly construed. Hilliard says: "The power of sale in a mortgage is construed rigidly, and will not warrant the execution of any power not definitely expressed."

I Hilliard, 138.

"It will be jealously watched and declared void for the slightest excess, or anything that prevents competition. It will be strictly construed against the mortgagee."

Ibid.

6 If we apply these principles to this case, it is obviously impossible to hold that the arrangement made by Langley & Co. with the purchasers, after the sale, was within the scope of their power. The mortgage gave them no power to vacate or abandon a sale made at auction, or to vary its terms.

This power is sometimes conferred upon trustees to sell, but the makers of this instrument did not see fit to insert it. Langley's authority was, first, to select an auctioneer; second, to prescribe the terms of sale, and third, as the agent of the mortgagor, to convey the premises to the purchaser. These are the only powers definitely expressed in the deed. They are, therefore, 7
according to all the authorities, the only powers which Langley could lawfully exercise. We admit that the terms of sale were, originally, entirely within the control of Langley, but we insist that, having announced certain terms in a public advertisement, and a sale having been made upon those terms, their power was exhausted, and they could not, by a notice given at the sale, enlarge the scope of their powers, and confer on themselves the right to modify the terms of sale.

It is contended that the option given to Langley as to the terms of sale was without limitation as to the time within which 8
it should be declared, and that it could, therefore, be exercised after the sale as well as before it. It is true that no limitation as to time is in express terms imposed by the deed, though the language employed would seem to require the mortgagees to make their election as to the terms of sale, when the property was placed in the broker's hands. But this is immaterial, for it is a settled rule that, in determining the extent of a power, the intention of the parties in its creation must constitute the guide. Here the very nature of the power rendered its exercise before the sale necessary. 9

It is unreasonable to suppose that the mortgagor intended that the terms of the sale should be fixed after a sale had been actually made. This would be a most unusual and ruinous mode of conducting a public sale, and cannot be supposed to have been within the contemplation of the parties to this instrument, which expressly enjoins that the sale shall be conducted according to the custom of vendue.* And this view is strengthened by the fact that the mortgagees were not made the agents of the mortgagors to sell the mortgaged premises. Their power was

*It was their duty not only to fix but to *advertise* the terms of sale. The deed does not expressly require this, but a mortgagee will be held to the utmost diligence for the protection of the rights of his principal, and cannot shelter himself behind a mere literal compliance with the terms of his power. Montague *vs.* Dawes, 14 Allen, 369. 10

studiously limited to the selection of a "good broker or auctioneer," by whom the sale was to be conducted, and upon whose skill the mortgagors evidently relied to prevent a sacrifice of their interests. And the reason for this is obvious. A sale made under this power would necessarily be an enforced sale. In ordinary auctions
11 the owner of the property is free to act. He may sell or withdraw his estate from the auctioneer's hammer. According to the authorities, he is even permitted to employ a bidder, who may prevent the sale below a limited price. But in sales made under a power like this, no such option is allowed. The sale is positive; it is generally against the will of the debtor, and not unfrequently against the desires and interests of his creditors. It was, then, the first dictate of prudence that the power given to the mortgagees should be regulated with jealous care, and the deed wisely provided that the sale should be conducted, not by the mortgagees,
12 who, in the language of a high authority, "were not free to act for the benefit of their *cestui que* trusts, but were first to serve their own purpose, regardless of those for whom they stood trusted," but by an auctioneer, whose skill and impartiality would afford some safeguard against a sacrifice of the property.

The construction contended for by the appellees renders these provisions of the deed idle and nugatory. It makes the mortgagees entire masters of the estate. It invests them with a control which would enable them to defeat the objects intended to be obtained by a public sale, and to deprive the mortgagor of
13 any benefit he had derived from the skill of the auctioneer, for the right to alter or modify the terms of sale, in one particular, involves the right to do away with them altogether. If Langley & Co. had authority to waive payment of the cash required by the terms of sale, upon the ground that they might originally have directed the property to be sold entirely on credit, it is difficult to see why they might not have reduced the amount to be paid by the purchasers, upon the ground that their power to sell was originally without limit as to price. It is impossible to resist the conclusion that if the power to change the terms of
14 sale, so as to bind the junior encumbrancers, existed at all, it was without limit so long as Langley & Co. acted in good faith, for where discretion, such as is now claimed by the mortgagee is given, a Court of Equity will interpose only on the ground of

fraud. There is nothing in the mortgage to warrant the conclusion that the mortgagors intended to confer on the mortgagees such extraordinary and unusual powers. On the contrary, the carefully guarded terms of the power are inconsistent with such an idea.

Again, if while a contract of sale is still executory, the parties in any manner add to, or substract from, or vary or qualify 15
its terms, the legal effect of such change is to rescind the original contract and substitute a new one in its place. The stipulation, as to the time of payment, is an essential part of a contract of sale. If new terms may be substituted without a dissolution of the contract, so may new prices or new quantities.* If then the agreement made by the mortgagees with the purchasers be regarded as a change in the terms of sale, which was binding on all parties having an interest in the proceeds of sale, its legal effect was necessarily to annul the public sale, and to make a private sale of the mortgaged premises. This Langley 16
& Co. could not do, for it is conclusively settled that one having a power to sell at auction cannot legally execute this power by a private sale. This was expressly ruled in Greenleaf *vs.* Queen, 1 Peters, 138. "Where," says the Court, "by the terms of a deed the trustee is directed to sell real estate by public auction, he is bound to conform to this mode of sale. This is the test of value which the grantor thought proper to require, and it is not competent for the trustee to establish any other, although by doing so he might in reality promote the interests of those for whom he acted." 17

But again, Langley & Co. could not sell at private sale, because property bound by two mortgages cannot be sold under the first so as to discharge the lien of the second, unless the holder of the latter be a party to the sale. Where it is made by decree of the Court, the second lien creditor is always considered a necessary party to the case. If not made a party, then he is entitled to redeem, if he choose, within reasonable

*Where, under a contract for the sale of goods to be delivered on the 20th to the 22d, the time for the delivery was enlarged to the 23d or 24th, it was held that this change had materially varied the contract, substituting 18
for it a new contract. Stead *vs.* Dawber, 10 Adol. & Ell., 57; Marshall *vs.* Lynn, 6 Mees & Wels., 109.

time after the sale. But if Markey & Co. be regarded as parties to the sale made by Langley & Co. in 1867, that could be so only by virtue of the agreement made with them before that sale, and which bound them to abide by a sale made according to its terms. But what were those terms? The sale contemplated at that time was a public sale, duly advertised, and its conditions well known to all the parties to that agreement. None
19 of them gave notice of or expressed any desire to change the advertised terms of sale. The subsequent notice, at the sale, by Langley & Co., was an after-thought, to which Markey & Co. never assented, and of which neither they nor their attorneys had any notice whatever. A public sale, therefore, according to the terms as understood at the time of the agreement, was an essential part thereof, and only by such sale could the property have been discharged of their second lien.

If it be said that Langley & Co. without the assent of Markey & Co., could have discharged their lien by a sale made under the
20 first lien, we reply that the right to do so, if it existed, must rest upon the powers conferred in the first mortgage, before the lien of Markey & Co. had been perfected. After that the Kalmia Mills Company could not, even by deed in writing, have enlarged or changed the powers previously conferred in the first mortgage. Any such change would be a mere attempt, by a debtor, to confer a right posterior to the second lien, yet superseding it, and this would be contrary to the plainest principles of law. As well might he hope to execute a third mortgage, to take precedence of a second, as to change
21 the rights of the latter by a subsequent change of the powers conferred by a first mortgage. If this be so, then, as in this case, the first mortgage required a *public* sale, the subsequent assent of the Kalmia Mills Company, even if that were proved, could not authorize a private sale.

But the Circuit decree sustains the arrangement made with the purchasers, not only as within the express terms of Langley's power, but also upon the ground "that it procured the bid for the property over and above the mortgage debt, was necessary to secure the advantageous sale which had been made, was
22 intended, and was well calculated to protect the rights and further the interests of all creditors of the Kalmia Mills, and

would have been sanctioned by the Court if application had then been made to confirm it."

We will examine and dispose of these propositions in the order stated.

It will scarcely be contended that the bid made at the sale was procured by the arrangement made after the sale was completed. It was certainly not procured by any arrangement made before the sale, for it is conceded that Langley & Co., when approached before the sale refused "to commit themselves to any definite promise of assistance,"* and all that the purchasers aver is, that their "determination to bid was based upon the opinion that Langley & Co. had the authority and power, as well as the willingness to give to them more favorable terms than those announced in the advertisements."† It is equally certain that the bid was not procured by the notice given at the sale, for that conferred on the purchasers only the right which they would have had without it to "negotiate with the sellers for more favorable terms, provided it was to their mutual interests."‡ The causes which in fact induced Cogswell and his associates to bid for the property, are set forth minutely in the statement of facts, and need not be repeated here.§ Whether they would have abandoned their determination to "save themselves" by purchasing the Mill property, had Langley & Co. held out to them no hope of obtaining more favorable terms than those announced in the advertisemeut, or would have made the arrangements necessary to comply with their bid, is a question which, in all probability, the purchasers themselves could not now answer, and which this Court certainly cannot.

23

24

Nor can it with greater reason be said that the arrangement was necessary to secure the advantageous sale which had been made. By the auction sale a valid and binding contract had been entered into by Cogswell and his associates. They were persons of large means. It is in proof, that they were able, within a few days after the sale, to mortgage real estate, which Langley & Co. accepted as ample security, not only for the

25

*Statement, folio 13.
†Statement, folios 13 and 14.
‡Statement, folio 15.
§Statement, folios 7–10.

26

cash portion of the purchase money, but for future loans; on which it was then admitted* they could have raised the amount of cash required, but not without "a ruinous sacrifice," and which at the sale of 1868, notwithstanding the great and unexpected depreciation in the value of property which had taken place in the meantime, brought over $52,000.† Although they failed in their attempt to form a new company, they were able in the course of the ensuing year, not only to carry on the
27 enterprise, but to pay debts due by the Kalmia Mills, amounting to nearly $17,000.‡ It is difficult to see why compliance with their bid, could not have been enforced, or what defense they could have set up, had a bill for specific performance been filed against them.

Nor is it easy to perceive how the granting of more "favorable terms" "to approved purchasers" of undoubted solvency, "was calculated to protect the rights and further the interests of the creditors of Kalmia Mills," who were entitled to the proceeds of the sale. In point of fact, the arrangement, by which the
28 terms of sale were varied, has entailed upon these creditors, (if the theory of the appellee be correct), a loss of their entire debts, and its necessary effect, was to jeopard their rights by increasing the burden upon the property to the extent of $71,000, and thereby impairing its value as a security for the note set apart for their payment. While we do not impeach the good faith of the mortgagees, it is nevertheless manifest, that the property was brought to the hammer under every possible disadvantage. The advertised terms necessarily deterred all bidders who were not prepared to pay the very large amount
29 of cash which the terms called for, and the change subsequently made (if valid,) involved the creditors in all the risks inseparable from a sale made entirely on credit.

Concede, however, that the facts are correctly found by the decree, yet still they do not sustain the legal conclusion based upon them. That one acting by virtue of a specially delegated authority, cannot justify a departure from the terms of his power upon the plea that his principal might, perhaps, be benefitted

*Statement, folio 17.
†Statement, folio 33.
‡Statement, folio 28.

thereby, was expressly ruled, in the case of Greenleaf *vs.* 30
Queen, 1 Peters, 138, already referred to. Had some great and unexpected emergency arisen in the absence of those interested in the property, it might have been contended with some plausibility that the authority of Langley & Co. had been expanded by the force of circumstances beyond its ordinary limits. But this was not the case. Markey & Co. were *sui juris*, resided within the State, and were represented on the spot, by the counsel who had conducted the negotiations which preceded the sale. Upon what ground then, could Langley & Co. be justified in assuming to act for them, and to determine what was 31
calculated to "protect their rights and further their interests?" If they were to be bound by the agreement made with the purchasers, was it just or equitable to deny them the right of protecting their own interests in such manner as they deemed best?

Again, the Circuit decree sustains the transaction, upon the ground "that it would have been sanctioned by the Court, if application had then been made to confirm it." If this doctrine be correct, it follows that the extent of a power depends not upon the terms employed in its creation, but upon the arbitrary will of the Judge. But there is no such principle of law. It was 32
not in the power of any Court to sanction a departure from the terms and conditions of the instrument under which Langley & Co. were acting. These were a part of the contract of the parties, over which the Court could have no control. (Dolan *vs.* The Mayor of Baltimore, 4 Gill, 405.) Equity may aid a defective execution of powers, when the defect is only formal, but it cannot supply a defect in the substance of the power. "No principle is better established," says Judge McLean, "than that a Court of Equity can never interpose its aid in a case where there is a defect of power. It is the province of chan- 33
cery to carry *bona fide* contracts into effect, not to make them. Where there is a want of power in either of the contracting parties, over the subject matter of the contract, it can never be enforced by a Court of Equity." Piat *vs.* McCullough, 1 McLean, 69.

But concede, for the sake of argument, that it was within the discretion of the Court to sanction the action of Langley in modifying the terms of sale, is it by any means certain that it

would have done so? Suppose that Langley & Co. had filed a
34 bill at that time, alleging all that they now allege in support of the change of terms of sale, and asking leave of the Court to make such change. Would the Court have made any order in such a case, without first requiring that Markey & Co. as holders of the second lien should be made parties in the case? and if, having been brought into the case, Markey & Co. had answered, insisting on a compliance with the advertised terms of sale, setting forth the arrangement made to secure them after the publication of that advertisement and before the sale, of which arrangement Langley & Co. had been duly notified,
35 denying all notice or knowledge of the announcement at the sale of more favorable terms to approved purchasers, alleging that the purchasers then had ample means to comply with their purchase, according to the advertised terms, but that the value of their property was unsettled and fluctuating, by reason of the condition of the State, and that the purchasers would be in the enjoyment of the income of said property whilst the burden on it would be increasing by taxation, and the interest on the portion of the debt then payable, upon what ground could the Court, after such answer by Markey & Co., have released
36 the purchasers from complying with their bid? Can there be any doubt, that it would have replied to Langley & Co., "You are entitled to the cash portion, and desire to give the purchasers more favorable terms; then do so, if you are satisfied with the security offered by them, but it must be done at your risk—not at that of others."

The question then is whether Markey & Co. have adopted the act of the appellees.

It is conceded that at the time they had no knowledge of it, and gave no consent.* Did they acquire such knowledge subse-
37 quently?

Actual notice is alleged in some of the answers, but it is not now pretended that such notice was proved. But, it is said, they should have enquired, and enquiry would have led to knowledge. But why should they have enquired? When they consented that the sale of 1867 should be made without objection from them, the terms of the auction sale had been advertised.

*Statement, folio 24.

Of Langley's willingness to grant more favorable terms they were not informed; and they, therefore, had a right to assume, and did assume, that the arrangement made to secure their debt 38
would be faithfully executed. As by the advertised terms, the $20,000 note, in which they were interested, did not mature until April, 1868, there was no reason why they should have made any enquiry, and the inference that they did would be in a high degree unreasonable. And so far from it having been their duty to inquire, we affirm that it was incumbent on Langley & Co. not to change the contract without their express consent. Their knowledge of such change would then have been matter of certainty, not a mere matter of guess or assumption.

It is contended, again, that the conveyance to Cogswell having 39
been recorded, appellants had constructive notice of its contents, and that their subsequent silence was an implied assent to the change in the terms of sale.

The obvious answer to this suggestion is that recording is constructive notice only to purchasers, mortgagees, and other persons claiming an interest in the property through subsequent conveyances from the grantor. As to all others, constructive notice cannot be presumed; actual notice must be proved. But even had actual notice been given, the silence of Markey & Co. could not be construed as acquiescence. The cases in which silence has 40
been held to amount to a ratification are all cases where, in consequence of such silence, some act has been done by which the relative position of the parties has been changed.* A delay of intelligence until an election to approve or disapprove could not possibly change the transaction already concluded, defeats the right to construe silence into acquiescence.

In this case, if Markey & Co. received notice at all it was when it was too late for them to derive any advantage from such notice.

If, however, in the conceded absence of all direct proof that 41
they even knew of the arrangement, it should still be presumed that Markey & Co. did assent to it, because they expressed no dissent, or upon any other ground, then we submit that they can only be presumed to have acquiesced in the arrangement which

*Amory *vs.* Hamilton, 17 Mass.. 103; Packard *vs.* Seay, 6 Adolp & Ellis, 474.

was actually embodied in the conveyance to Cogswell and the other cotemporaneous instruments, by all of which, as we shall presently show, the $20,000 note was placed on the same foot-
42 ing as the rest of the purchase money. Of any intention or understanding on the part of Langley & Co., different from the intent apparent on the face of these instruments, Markey & Co. were ignorant, and, of course, cannot be presumed to have acquiesced therein.

We have thus shown that without the consent of Markey & Co., Langley & Co. could not make a private sale of the mortgaged premises, or vary the advertised terms of the public sale, so as to affect the interests of others. In so far, however, as their own interests are concerned, it was competent for them to
43 do this. When, therefore, they gave notice through the auctioneer of their willingness to grant more favorable terms of sale to approved purchasers, and when in pursuance of this notice they actually did modify the terms of sale, they must be construed to have done so out of and at the risk of that portion of the proceeds of sale to which they were entitled. Over this their power was absolute. They could waive its immediate payments, and lend it to the purchaser upon such security as they saw fit. That they themselves regarded the transaction at the time as a loan of their own funds, and intended to bind them-
44 selves, and no one else, by their act, is sufficiently established by the following considerations:

1st. In the bond and mortgage, and the agreement which preceded it, neither the Kalmia Mills nor Markey & Co., are named; but Langley & Co. contract with the purchasers as principals. If they had made the modification of the terms of sale as agents of the mortgagor and custodians of the interests of other creditors, the instruments executed would have declared this. But this was not done; on the contrary, the agreement is made between W. C. Langley & Co., of the first part,
45 and Cogswell, Evans & Mordecai, of the second part, and throughout the paper they covenant for *themselves* and their heirs, executors and administrators. They do not assume the right to speak for any one else. (See agreement, transcript of Record, folio 169.) So, too, the bond of indemnity is personal to them, and was evidently intended to protect them, and none other,

from the consequences of their act. By it the obligors acknowledge that they are bound to "Langley, Keyser & Cooke, copartners in trade, under the firm name of Langley & Co.," and the condition is that they "shall indemnify, and save harmless Langgley & Co." from all loss or damage *they* may sustain. It was an 46
obligation for the personal security of Langley & Co., and intended to shield them from the consequences of their act. See Bond, Transcript of Record, folios 174–178.

2d. That Langley & Co. well knew that they could not bind the other creditors by the arrangement made with the purchasers, and did not intend to do so, is further shown by the account of the transaction given in the bill, at folio six, where the complainants justify it upon the ground that they alone would have been entitled to the cash, had it been paid, and that they, therefore, had the right to waive its payment and to ex- 47
tend the time for the payment of so much of the balance of the purchase money as they were entitled to receive, "leaving the $20,000 note to be paid according to the terms as advertised," and aver that this was all that they had done.

3d. By the fact which if standing alone would be conclusive that the bond of indemnity secures *future loans* to be made by Langley & Co. to the purchasers, and places these loans upon precisely the same footing as the cash portion of the purchase money, the payment of which had been waived.

If then, as we have endeavored to show, the theory of the 48
respondents necessarily involves Langley & Co. in the charge of exceeding their authority, and that advanced by the appellant avoids this result, the latter must be adopted, for the rule is "that where the acts of a party may have a double intendment, and the one standeth with law and right, and the other is wrongful and against the law, the intendment which standeth with law shall be taken."

2 Parsons on Contracts, 500.

It therefore being manifest that Langley & Co. could not, 49
under the terms of the mortgage, make a private sale, and further, that their changing the terms of the public sale after it had ended, would be a private sale, their act is to be so construed as to maintain their authority for what they did, and not to defeat the act itself. But that can be done, not by regarding the new

arrangement as a change of the terms of the public sale, but by regarding it as a loan by them of the cash portion which belonged to them, and for which they took other security. This loan is also included in the mortgage of the property sold, but this could only have been intended to give them a lien upon
50 any surplus which it might yield after paying the credit portion of the purchase money. This construction of their act not only sustains the sale made at that time as a public sale, but is most consistent with the various papers executed, as we have endeavored to show.

II.

If, however, the Court should be of opinion that the positions heretofore taken are untenable, then we submit that the $20,000 note is entitled to share *pari passu* with the other notes in the proceeds, both of the Mill property and the in-
51 dividual property. In support of this view we say:

I. That the sale of 1867, and the acceptance of the notes of the purchasers by Langley & Co., extinguished their mortgage debt, and with it the priority to which they had been entitled.

The principle is well settled, that foreclosure, in whatever way effected, operates as payment of the mortgage debt to the extent of the value of the property, at the time of the foreclosure. If the mortgagee proceeds by bill for technical foreclosure, the estate becomes his property, and as there is no mode of ascertaining its value, he is held to have taken it in satisfac-
52 tion of his debt. If, on the other hand, he sells the property, either under a decree of Court, or under a power contained in the mortgage, the sale extinguishes the debt, to the extent of the price obtained. 2 Hilliard on Mortgages, Ch. 36, § 1.

Applying these principles to the present case, it is clear that the mortgaged premises having, at the sale of 1867, brought more than enough to pay Langley & Co. in full, the debt due to them by the Kalmia Mills was thereby extinguished, and with it their right to priority. We do not, of course, deny that Langley & Co., as holders of the paramount lien, were entitled
53 not only to take the cash portion of the purchase money, but also to retain in their own hands the whole security taken for the credit portion, and to apply the proceeds thereof, as collected,

to the liquidation of their claim. Had they done this, they would have had the fund in the same position as a fund in Court, which is always applied, as realized, to the various liens, according to their original priorities. But by their conduct they have placed themselves in the position of parties entitled to a fund in Court, consisting of notes secured by the same mortgage, which, with their consent, has been divided amongst lien creditors. Where a fund is thus distributed, it is clear that the 54
old mortgage debtor and the old mortgage priority are entirely discharged, and the holders of the new securities are entitled only to such rights as are secured to them by the new mortgage. To such a distribution Langley & Co. in this case assented. They retained the notes of the purchasers to the amount of their claim, (Statement, folio 21,) entered into a solemn and formal agreement to accept the notes so retained in payment of the debt due to them by the Kalmia Mills,* and transferred to Evans the note for $20,000, to be held by him in trust for the other creditors of the Kalmia Mills, without any stipulation that it was to be postponed 55
to the notes which they retained. The necessary legal effect of this was to destroy their right to priority. Their old debt was gone, and the new notes held by them, and the $20,000 note held in trust for the other creditors, being parts of the same mortgage debt, are entitled to share proportionally in the mortgage security, unless a different distribution is prescribed by the deed.

Dooley *vs.* Hays, 17 Sergt. & R., 400. Mohler's Appeal, 5 Burr, 418. Hancock's Appeal, 34 Penn., 156.

The inquiry therefore remains, does the deed "effectually secure the payment of Langley & Co. in preference to every 56
other creditor," or does it put all the parties on the same footing? The answer to this is to be found in the deed itself, by reference to which it will be seen that there are but three purposes declared in the trusts, viz:

---

*Statement, folio 19. The Referee says: "In the present case Langley & Co., their Solicitor, Evans, Mordecai and Cogswell, all state that they did not accept these notes as payment." This is a mistake; Langley and Mordecai did not testify; Evans and Cogswell testified, but nothing upon this point will be found in their testimony which is appended to Referee's Report, Transcript of Record, folio 166, 169. Mr. Miles is the only witness who testified in the manner stated by Referee. 57

First—To pay the costs and expenses of the sale.

Second—To pay the following promissory notes, naming them in order, according to the dates at which they respectively became due, and ending with the note of $20,000, but making no other distinction.

Third—After paying the entire amount of the purchase money, then to hold the remainder subject to such uses as should be declared by Cogswell. (Transcript of Record, folio 136.)

If, then, we look only to the terms of the deed, it is impos-
58 sible to come to any other conclusion than that the notes secured by it all stand on the same footing, and must be paid *pari passu*. And this conclusion will be still further strengthened if the deed be read by the light of the surrounding circumstances. There is no doubt that Langley & Co., at the time, regarded the mortgage of individual property as an ample security, not only for the cash portion of the purchase money, but also for future loans. It is, therefore, not a matter of surprise that they did not then consider it important to reserve to themselves the right to be first paid. Not only so; there was a very special reason
59 why they should not have done this. Even if the arrangement made with the purchasers was within the scope of their powers, it was still their duty to require, in lieu of the $71,000 cash, such security as would make its ultimate payment entirely safe. Any attempt, therefore, to preserve their priority while granting indulgence to the purchasers, if not a fraud upon the other creditors, for whom they were in some sense trustees, and whose rights they were bound to protect, would at least have laid them open to the suspicion of allowing the purchase money to remain out on a security the sufficiency of which they them-
60 selves doubted.

But it is contended that if the deed puts all the notes upon the same footing, it was drawn and executed in mistake, and should be reformed in this respect. The view taken of the case by the Circuit Court rendered the consideration of this point unnecessary. The Referee in his report held that the deed should be reformed, and bases his conclusion upon the uncorroborated evidence given by Mr. Miles, the Solicitor of Langley & Co., who testified, "that they never had any intention of surrendering their priority, and that he was instructed to draw the deed so as to preserve it."

When the parties to an agreement have expressed their purposes and stipulations in writing, a most salutary rule of law inhibits the admission of parol testimony to vary or explain the written instrument. In South Carolina, where this case arose, it has been decided that parol evidence may sometimes be admitted on the part of a defendant to show a mistake in a deed to prevent the specific execution of it, but never on the part of the complainant to set up a different deed from that which has been executed. (Westbrook *vs.* 2 McCord's, Ch., 115.) And this Court, in Bailey *vs.* R. R. Co., 17 Wallace, ruled that parol evidence was inadmissible to show how all the parties to a written agreement understood the transaction from its commencement, as its tendency was to explain and qualify what was written. The testimony of Mr. Miles was, therefore, clearly inadmissible. It will at least be conceded that those who call upon the Court to control the legal operation of a solemn deed, which the law, through an abundance of caution, has required to be executed in the presence of two witnesses, by the testimony of a single witness, given after the lapse of years, as to instructions given to counsel, employed to draw the deed, undertake a task of no ordinary difficulty. It is certainly well settled, that a Court will reform a written instrument only on the clearest and most conclusive evidence of mistake.

61 62 63

"The mistake," says Judge Story, "must be clearly made out, and by proof entirely satisfactory." * * * * * * "But if the proofs are doubtful and unsatisfactory, Equity will withhold relief." * * * * * *

"There is less difficulty in reforming written instruments, where the mistake is mainly or wholly made out by other preliminary written instruments or memorandums of the agreement. The danger of public mischief or private inconvenience is far less in such cases than it is in cases where parol evidence is admitted, and accordingly Courts of Equity interfere with far less scruple to correct mistakes in the former, than mistakes in the latter." (Story's Equity, § 161.)

64

Tested by these considerations, the evidence in this case is clearly too vague and unsatisfactory to authorize the reformation of the deed. Assuming it to be correct, we may infer that there has been some mistake on the part of those concerned in

65 the preparation and execution of the deed, but we cannot learn from it what were the precise intentions of the parties. If the Court were willing to reform the deed it would be impossible to ascertain from the testimony the terms and particulars in which it should be reformed. When did Mr. Miles receive his instructions? Before or after the waiver of the cash? How was Langley's priority to be preserved? In the trust deed or the mortgage or both? Upon these points the evidence throws no light whatever.

"Again, the preliminary and cotemporaneous" instruments, so
66 far from pointing to any mistake in the deed, are in entire harmony with its provisions. The same mistake, (if there be any) runs through all of them. The bond and mortgage, as we have seen, secures future loans, which Langley & Co. expected to make. According to the Appellee's theory, and that of the Circuit decree, this bond and mortgage were also intended to secure the payment of Langley & Co., in preference to every other creditor. No such preference is given to them in these instruments. They too must, therefore, be reformed. Would the Court, in doing this, give Langley & Co, priority over the
67 other creditors, both as to the debt existing at the time of the sale, and their subsequent advances, or would it distinguish between these claims, and give priority only as to the former? If it pursues the latter course, upon what testimony will it rest its decree? If the former, it must hold that Langley & Co., by advancing to the full amount of the bond, could have excluded the other creditors from all participation in the individual property.

But there are other objections equally insuperable.

In the first place there is no allegation in the bill to support
68 this claim, and the complainants must stand or fall upon the case made by the pleadings. (Texas vs. Childs, 21 Wallace, 488.) Relief against accident and mistake is a distinct ground of equitable jurisdiction, and must be exercised according to the established practice of a Court of Equity, upon allegations charged in the bill, and which the defendant has a right to deny in his answer. It is essential, upon every principle of correct pleading and practice, that it should not be exercised collaterally. In the bill filed by the complainant there is no

allegation that the deed was other than it was intended it should be. On the contrary, it is averred that by its express terms it 69
secures to the plaintiff "a right to have the property sold, and the proceeds applied to their debt, in preference to all other creditors," and "that their rights under the conveyance are paramount to the claims of all other creditors of the Kalmia Mills," folio 8. The prayer of the bill is not that the deed be reformed, but that the rights of Langley & Co., under the deed, be enforced, and that they be paid according to the trusts of the deed."

Even, therefore, if the alleged mistake had been established by the most conclusive evidence, the respondents would not be 70
entitled in the present state of the pleadings, to have the deed reformed.

Again, if there was mistake, it was a mistake, not of fact, but of law.

In their answer to the cross-bill, folio 84, Langley & Co. aver "that they believed and were advised that the said agreement, the conveyance to Harvey Cogswell, in trust, on the tenth of May, 1867, and the bond of indemnity and mortgages executed by the said purchasers, all distinctly expressed and enforced in a legal manner this, their distinct prior right and 71
lien, and these defendants say that if these said several instruments are in any degree or manner defective and deficient in the full, exact and legal expression of this their right, and according to their strict and technical import, do not protect and effect the same, that then the same were executed and consented to by these defendants in ignorance and mistake of fact."

According to this statement the ground of complaint is not that the deed is not precisely what it was intended to be. The parties may have been ignorant as to the effect of the terms employed by them, but there is no proof of mistake. No word was 72
inserted in the deed, nor omitted from it, not intentionally inserted or omitted.

The Court is not asked then to make the deed what the parties intended, but to make it that which they did not intend, but which they would have intended, had they been better informed. That relief cannot be granted in such a case is conclusively settled in the case of Hunt *vs.* Rousmaniere, 1

Peter's, R. 16. (See also Adam's Equity, page 170, Story's Equity, § 115.)

73 If the Court will not interfere in such a case, even as between the parties, still less will it do so in a case like this, in favor of one creditor against other creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself. "If all other difficulties were out of the way," says the Court, in Hunt *vs.* Rousmaniere, "the Equity of the general creditors to be paid their debts equally with the plaintiff, would, we think, be sufficient to induce the Court to leave the parties where the law has placed
74 them."

The equities of Markey & Co. are at least equal to those of the Appellees. By the deed as it stands, they are placed upon an equality. Is not this just? The skill and labor of the mechanics, if they did not create this property, certainly gave to it the greater part of its value. Why should the mortgagees receive the benefit of these without making some compensation therefor? The contract made by the Kalmia Mills with Markey & Co., was prior in point of time to Langley's mortgage, and had it been duly recorded would have constituted a first lien upon
75 the mortgaged premises. If, through ignorance of the law, or some oversight, they have lost this advantage, and if the Court cannot place them in the position which they would have occupied, had this been done, upon what principle of equity can it in favor of Langley & Co., who have profited by their ignorance or neglect, deprive Markey & Co. of the benefit which they have derived from the alleged misapprehension on the part of Langley & Co, as to the legal effect of the security which they deliberately selected?

If application had been made for that purpose, even immedi-
76 ately after the execution of the deed, the Court may well have inquired by what equity they would be aided, to preserve their priority, so as to avoid the possible consequences of their own waiver of the cash. And now after so long a lapse of time, when they discover that less is to accrue, by a year's interest on the cash portion being added to the incumbrance, by a heavy decline in the real estate, which they accepted as additional

security, and by the discovery of large prior incumbrances on that property, when, by their delay and laches, their original 77
equities have been very seriously weakened; surely the Court will not now under these circumstances, and on such indefinite and uncertain parol testimony, lend its aid to reform a deed, so deliberately made, and so long regarded as correct.

Lastly we submit that even if the trust deed should be reformd, the mortgage of the private property cannot be changed. The deed can only be reformed on the presumption that Langley did not intend to relinquish their paramount lien on the mill property. On the individual property, they held no prior lien, and this presumption cannot, therefore arise.

78

III.

The only remaining question to be considered is, how shall the proceeds of the note for $20,000 be distributed? The able discussion of this question by the Referee in his report, (Transcript of Record, folio 132) renders it unnecessary to do more than state the following propositions:

I. The decree adjudges "that Markey & Co. have a prevailing lien upon the proceeds of this note," "and the same must be first applied to the payment of their claim before it is applied to the payment of the general creditors without lien." (Transcript of Record, folio 197.) This portion of the decree not 79
having been appealed from is final. Markey & Co. are, therefore, entitled to receive the amount reported to be due to them, ($11,959, with interest, Transcript of Record, folio 128,) before the unsecured creditors can receive anything.

Any surplus remaining after payment of Markey & Co., must be distributed *pro rata* among the unpaid creditors of the Kalmia Mills, whose claims amount to $22,433.

II. The payments made by Cogswell to some of the creditors of the Kalmia Mills amounting to $16,674, cannot be credited upon the $20,000 note.

1st. Because the decree "having decided that Markey & Co. 80
had a valid lien on a portion of the property of the Kalmia Mills, by virtue of their mechanic's contract, subsequent to Langley & Co.'s lien; and that no other creditor than these

two firms had any lien on the property," (Transcript of Record 197,) and that Markey & Co. "will be entitled, after Langley & Co. have been paid in full," to be paid before the general creditors, it is clear that the payments made by Cogswell to the unsecured creditors cannot be credited upon this note either in
81 full or to the extent of the dividend to which these creditors would be entitled, until the claim of Markey & Co. has been fully satisfied.

2d. Because by the arrangement made before the sale of 1867, a trust as to this fund was created in favor of all the creditors of the Kalmia Mills, who, confiding in it, desisted from further efforts to secure the payment of their claims by adverse proceedings. The creation of this trust in favor of these creditors, was a contract with them which could not be changed or abrogated without their consent. (Barings *vs.* Dabney, 19 Wallace, 9.)
82 It was not, therefore, competent for the Kalmia Mills Company, or Evans, its President, subsequently to vary the terms of this trust, and to pay a part of these creditors in full, to the entire or partial exclusion of others. It certainly was not competent for Cogswell, the debtor of the Kalmia Mills, to create preferences among these creditors, or to dictate to which of them the money which he owed to the Kalmia Mills should be appropriated. The most that can be claimed with any show of reason is,
83 that Cogswell shall be regarded as having purchased the claims of the creditors whom he has paid, and that his Assignee shall receive the dividends from this note to which these creditors would have been entitled.

PRESSLEY, LORD & INGLESBY,
Appellants' Attorneys.

James Lowndes
Appellant's Atty.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

No. 197.

F. L. MARKEY & CO., ET AL., APPELLANTS,

vs.

W. C. LANGLEY & CO., ET AL., APPELLEES.

Brief of C. R. Miles, for Langley & Co., Appellees.

The general question presented to the Circuit Court in this case was how the purchase money of the property sold in 1868, under the orders of the Court, and bought by W. C. Langley, 1
should be applied.

The Circuit Decree decides, that the sale having been made by Langley & Co., under the power reserved in their conveyance to Cogswell, trustee, who was the purchaser at the sale made by them in 1867, under the power reserved in the mortgages of the Kalmia Mills, the purchase money must be distributed in the same manner, and in the same order of priority, as the proceeds of the sale of 1867; and that Langley & Co. having by virtue of their mortgages had the prior and paramount lien on the property sold in 1867, their right upon the 2
fund derived from the sale was as complete as in the land itself; and that, therefore, they were entitled to be paid in full out of the purchase money of the sale of 1868, before any other creditor of the Kalmia Mills, or creditor of the purchasers at the sale of 1867.

In the aspect in which the case is presented to the Court, the

decision of the question of priority between Langley & Co. and the other creditors of the Kalmia Mills, depends mainly upon the effect to be given to a single act of Langley & Co., viz: the
3 arrangement entered into with the purchasers at the sale of 1867, for by no other act, before, at, or after the sale, is it pretended that Langley & Co. surrendered or waived the priority secured to them by the mortgages under which the sale was made.

It is necessary to understand distinctly what is meant by "the arrangement entered into by Langley & Co. with the purchasers at the sale of 1867," which the Circuit Decree sustains as within the scope of their power and duty, and as preserving their right to priority of payment.

4 The Decree says, "the agreement between Langley & Co., and the purchasers, the bond of indemnity, and the mortgages of individual property securing it, and the trust deed to Cogswell, are parts of one arrangement, which effectually secures the payment of Langley & Co., the creditors having the paramount lien, in preference to every other creditor." (Statement, fol. 52.)

The negotiations between Cogswell, Evans and Mordecai, and Langley & Co., before the sale; the authorized announcement made by the auctioneers at the sale, that the purchasers would be able to negotiate more favorable terms with the sellers than
5 those announced in the advertisements; and the consequent bid by Cogswell of $20,000 more than the mortgage debt, are parts of the agreement between Langley & Co. and the purchasers, and therefore, necessarily embraced in the arrangement.

In deciding the question, what effect was produced on the rights of the parties by the arrangement with the purchasers at the sale of 1867 by Langley & Co.? it will be necessary to consider, first, what was the character and position of Langley & Co. at the time the arrangement was entered into, and what powers they possessed in consequence; the circumstances under
6 which the arrangement was made; and the intent with which it was done.

Langley & Co. were the largest creditors of the Kalmia Mills, to which they had loaned, in 1866, $180,000; which sum was then estimated to be sufficient to complete the Factory and put it into operation.

This amount had all been expended, and the work was still unfinished, and required a large amount to complete and render it productive.

They were also the largest creditors of Evans, Cogswell and Mordecai, by reason of their endorsement of the notes of the Kalmia Mills.

Langley & Co. had the paramount lien on the property and the only lien which covered the entire property; they were mortgagees, with express power to sell upon default of payment, without resort to any court, for cash or credit, at their option, and to apply the proceeds of sale, after payment of expenses, to the payment of their debt, and to return the surplus to the mortgagor; and were also attorneys irrevocable of the mortgagor, to convey the mortgaged property to the purchasers at the sale made under their power; and "to do all and every act necessary and proper for performing the covenants contained in the mortgages," viz: the payment of their debt, and expenses of insurance, which might be paid by them.

The character of a mortgagee with a power to sell upon default of payment, is somewhat anomalous, and differs in some essential particulars from that of other trustees, because, being by express covenant of the grantor, "made entire master of the estate, he is not only invested with the control of his own property, but is also a trustee of the equity of redemption, with absolute power," (except so far as he is restricted by the terms of his power,) "to dispose thereof, not exactly for the best advantage of his *cestui que trust*, but for his own benefit, so far, at least, as his trusteeship stands in the way of a peremptory or immediate realization of his money. This is a character incompatible with a trustee; he is not free to act for the exclusive benefit of his *cestui que trust;* he is first to serve his own purpose, regardless of those for whom he stands trusted, and then, having secured himself, he becomes a stakeholder for the mortgagor."

Coventry cited 1 Hilliard on Mortgages, 132.*

---

*The validity of a power of sale vested in the mortgagee is too firmly established both in England and America to be any longer questioned—and such a power in a mortgage is held to be in the nature of a trust; irrevocable; can be exercised without the concurrence of the mortgagor; is final and conclusive—equivalent to a foreclosure and sale under a decree in equity;

Although Lord Eldon once expressed a doubt of the propriety of entrusting the power of sale to the mortgagee, "Yet," he adds, "it is too much to say that if the one party has so much confidence in the other as to accede to such an arrangement, the Court is for that reason to impeach the transaction."

11 The appellants assert "that the mortgagees were not made the agents of the mortgagors to sell the mortgaged property. Their power was studiously limited to the selection of a good broker or auctioneer, by whom the sale was to be conducted, and upon whose skill the mortgagors evidently relied to prevent a sacrifice of their interests."

This does not seem to be a reasonable construction of the mortgages to Langley & Co.; the direction that upon default of payment of their debt they shall "have full power and authority to put the mortgaged premises into the hands of some good
12 broker or auctioneer to be sold for cash or credit at their option or direction," cannot be fairly construed to take away or abridge their power of sale.

Such a provision is merely directory, indicating, in connection with the words which follow, "to the highest bidder, according to the custom of vendue," the agency, and mode, by which the sale shall be conducted, and their power exercised.

When the mortgagor entrusted to the mortgagee the power to determine the time, place and terms at and upon which the property should be sold, it can scarcely be supposed that by
13 interposing the agency of a broker to cry the property, it was intended to abridge the authority incident to thus making the mortgagee "master of the estate." In what respect could the broker or auctioneer protect the mortgagor, or those claiming under him, from the power of the mortgagee, whose instructions as to the time and terms of sale he must obey? Does the employment of a broker to conduct the sale give to the mortgagor any right or privilege, or does it deprive the mortgagees of any authority or control which would have been theirs if the sale was made by the mortgagees without the interposition of the

---

14 and a well established and approved security. Coote on Mortgages, 177, note A; Lewin on Trusts, 414, 427; Hill on Trustees, 479, note; 1 Sugden on Vendors, 61; 3 Martin's Conveyances, 479, note; 4 Kent, 147; 1 Hilliard, 128; Tiffany & Buller on Trusts, 769; *Mitchell vs. Bogan*, 11 Rich. S. C., 686.

broker? The powers and duties of Langley & Co. did not cease when they put the property into the hands of a broker, nor when the hammer fell, but they were trustees and attorneys irrevocable to complete the sale by conveyance with warranty, and to do all other acts necessary to effecting and performing the covenants of the deeds, the chief of which covenants was to pay the amount due to themselves. 15

I shall therefore consider the power, authority, and duty of Langley & Co. under these mortgages, as those of mortgagees with power to sell upon default of payment.

"These powers of sale are not ordinary powers, operating by means of limitation of use, but *trusts* declared on the legal estate in the mortgagee, giving him powers more extensive than he will have as mortgagee." 1 Hilliard on Mortgages, 138.

But I will consider the rules which govern the Court in the construction of the powers and duties of a trustee for sale in general, and the measure of his responsibilities, without dwelling 16 further upon the peculiarities which result from the power of sale being directly vested in the mortgagee himself.

The powers and duties of a trustee to sell, so far as this case is concerned, may be summed up as follows:

He is bound to bring the estate to the hammer under every possible advantage to his *cestui que trust*.

Therefore he will not be justified in damping the sale by unnecessary restrictions in the conditions of sale; although he may properly affix such reasonable special conditions as are required; and he should use all reasonable diligence to obtain the best 17 price. The interest of the grantor must not be sacrificed to the particular purposes of the creditors, who are first to be paid out of the price of the estate, who are anxious that money should at all events be immediately raised.

Hobson v. Bell, 2 Beav. 17; Hill on Trustees, 179; Lewin on Trusts, 423; Tiffany & Buller on Trust, 479; Ord v. Noel, 5 Madd., Ch. 246.

The restriction upon the power of a trustee to make special terms or conditions of sale is, that they must not be such as would reduce the value of the property. But strict conditions 18 of sale, although somewhat unusual, will not lightly be deemed of such a depreciating character as to amount to a breach of trust. 1 Sugden on Vendors, 59.

But the fundamental rule is the same in relation to all persons in a fiduciary capacity, and is thus laid down by the Courts of South Carolina. "The liability of trustees is not measured by the abstract rule of their duty. The universal test of their liability or exemption from liability is this; is there, or is there not in this case evidence of faithful endeavors to fulfil it?
19 It has sometimes been said, that if the act done by the trustee be such that a prudent man would not have done in his own affairs, or if what the trustee has omitted is what a prudent man would not have omitted in matters of personal interest, the trustee shall be liable. But this rule is manifestly subsidiary. It is used as a *test of unfaithfulness*, which after all is the *fundamental ground of liability.*" Hext v. Porcher, 1 Strob. Eq. 171; Glover v. Glover, McM. Eq. 154; Boggs v. Adger, 4 Rich. Eq. 408.

"Trustees who have acted within the limits of their dis-
20 cretion, in good faith, and with ordinary care and prudence, are not liable for losses arising from errors of judgment." Nance v. Nance, 7 Rich. N. S. 209.

The circumstances under which the arrangement was made, appear from the Statement of the case. Evans, Cogswell & Mordecai having embarked in the original enterprise, and having not only exhausted the original capital subscribed, but having made themselves personally liable to Langley & Co., for the amount borrowed from them; the money so borrowed having been expended, and the factory being still unfinished, and re-
21 quiring a very large amount to complete it and put it into operation; finding it impossible to raise additional capital to complete the enterprise, determined to make another effort to save themselves, by purchasing the property at the sale about to be made by Langley & Co., under the power given to them in the mortgages of the Kalmia Mills. They determined that they would bid for the property an amount, which they computed would, together with the other assets of the corporation, be sufficient to pay not only Langley & Co., the paramount lien creditors, but all the creditors of the Kalmia Mills subsequent to
22 them, and who were without special security.

This intention they announced to all the creditors, including Markey & Co., "whose counsel expressed complete satisfaction

with the course indicated;" they also entered into a covenant with Markey & Co., that in case they became the purchasers, they would complete the contract made with them by the Kalmia Mills. "All other creditors were notified of this arrangement, and either acquiesced or expressed no dissent therefrom." (Report of Referee, Transcript of Record, folio 123.) They also communicated their intention to Langley & Co., "explaining that their purpose was to form a new company, and 23
raise by subscriptions to the capital stock, a sufficient amount to pay off all debts and put the factory into operation; and that of course they would be dependent upon their *indulgence* as to payment, and their *aid* to enable them to carry out their intention. Langley & Co., without committing themselves to any definite promise of *assistance*, expressed their willingness to give any reasonable *indulgence as to time*, provided they gave adequate security." Cogswell and his associates aver, that their determination to bid a sum which they estimated to be sufficient to pay all the creditors, and their announcement of their intention 24
to the creditors, was based upon the expectation of receiving from Langley & Co. the promised indulgence as to time, their authority to give which under their power they had not heard doubted; and claim that such indulgence was what was intended by the announcement made at the sale, that the purchasers would be able to obtain more favorable terms than those advertised, namely, one-third cash, balance in six, nine and twelve months. (Statement, folios 13 and 14.)

After the sale, at which Cogswell, in behalf of himself and his associates, had bid for the property $20,000 over and above 25
the amount of the mortgage debt to Langley & Co., a personal negotiation took place, at which the purchasers showed their inability to raise one-third of the purchase money in cash ($71,445.69), and that the attempt to realize that amount upon their property would defeat the purpose of the purchase, and claimed a year's indulgence in which to try their experiment, the expectation of receiving which had induced them to bid. Langley & Co. reiterated their willingness to give the indulgence, provided their rights and interests were preserved and protected by additional and adequate security. The memorandum of agreement, 26
the bond of indemnity, mortgages of individual property, the

notes of the purchasers, and conveyance to Cogswell, in trust, which constitute the arrangement, were all executed in pursuance and furtherance of this agreement and understanding between the parties.

The intent with which the arrangement was made is to be determined from the accompanying circumstances, as well as from the declarations made by Langley & Co. and the purchasers, contained in the pleadings in the causes. The special Referee
27 in his report says:

"The sale by Langley & Co. did not affect their claim to priority. * * * Did Langley & Co. before, at, or after the sale, do any act by which they waived this right? It does not appear that there was any reason for believing that the property was not worth much more than all the claims against it. The evidence does not cast a suspicion that Langley & Co., before the sale, made any agreement that creditors subsequent to them should be put upon the same footing with themselves. * * * Was any act done after the sale by which they surrendered
28 their right of priority? * * * * * * * After careful examination, I can discover no consideration or inducement leading Langley & Co. to any such surrender." (Transcript of Record, pp. 135, 136, 139.)

Langley & Co., in their answer to the cross bill of Markey & Co., allege that "the agreement which they entered into with the said Cogswell, Evans & Mordecai after the sale, was made in pursuance of what they were advised was within their power and discretion, and they never conceived that said agreement could be construed as a waiver, or postponement of their distinct
29 prior lien upon all the property of the Kalmia Mills sold under said mortgages, and their first lien upon the individual property of the said purchasers, mortgaged to them as collateral and additional security for their debt; that on the contrary they believed, and were advised that the said agreement, the conveyance to Cogswell, and the bond of indemnity and mortgages executed by said purchasers, all distinctly expressed and enforced in a legal manner this their distinct prior right and lien." (Transcript of Record, p. 84.)

Harvey Cogswell, the purchaser in trust, says "that he be-
30 lieved at the time of entering into said agreement and executing

said several instruments, he was securing to the said Langley & Co. the first lien upon all the said property, and that the claims of all other creditors of the Kalmia Mills, and of himself and the other purchasers of the property, were subsequent to and subject to the said prior right and lien of Langley & Co." (Transcript of Record, p. 35.)

Evans says, that he and Cogswell and Mordecai being individually responsible for the entire debt to Langley & Co., "determined to buy in the property at the sale for their own protection, *provided* they could arrange the terms with the said 31
Langley & Co., who had given express notice at the said sale, by a written notice read by the auctioneer, that more favorable terms than those advertised would be given to approved purchasers." (Transcript of Record, p. 42.)

Langley & Co. contended that the arrangement made by them with the purchasers at the sale of April, 1867, did not impair or disturb their lien and right to priority of payment out of the purchase money; but that in making it, they acted as agents of the mortgagors, in pursuance of their power, and that if loss ensued, it must fall upon their principal, or the 32
creditors of the principal subsequent to themselves, and not upon them.

1. Because the said arrangement was made in pursuance of the express power given them in the mortgages under which the sale was made.

2. Because (*a*) the arrangement procured the bid for the property over and above the mortgage debt; (*b*) was necessary to secure the advantageous sale which had been made; (*c*) was for valuable and adequate consideration, viz: the mortgage of additional property to secure the payment of the entire pur- 33
chase money; (*d*) was intended and was well calculated to protect the rights and further the interests of all creditors of the Kalmia Mills, subsequent to themselves, and was, therefore, in accordance with their duty as agents and attorneys of the mortgagor, and trustees under mortgages with power of sale; (*e*) and would have been sanctioned by the Court, if application had then been made to confirm it.

3. Because the said arrangement was sanctioned or acquiesced in by all the creditors of the Kalmia Mills, especially by Markey & Co.

34 The judgment of the Court, after careful consideration of the facts and arguments, was, that these positions of Langley & Co. are all supported by the facts as reported, and by reason and authority; and sustain the arrangement made by them with the purchasers at the sale of 1867, as within the scope of their power, authority and duty as mortgagees with power to sell and apply the proceeds to the payment of their debt; was binding upon all parties; and their right to priority of payment out of the purchase money, represented by the notes of the purchasers when collected, was not waived or impaired.

35 The appellants contend that the Decree upon these points is erroneous, both as to facts and law.

I shall endeavor to show that the Decree is sustained by the facts reported, and by reason and authority:

1. The arrangement was within the scope of the express power given to Langley & Co. by the mortgages under which they sold. The power was to sell "for cash or on credit, at their option and direction," if, therefore, they had from the first instructed the auctioneer to sell the property upon the same terms as were afterwards secured by this agreement, that is
36 "for credit," there could have been no question made as to their authority under their power. The mortgages required them to give notice by public advertisement for thirty days of the *time* and *place* of sale, but did not prescribe that they should advertise the *terms* of sale, which were entirely within their option and direction. Therefore, in the first advertisement they declared that the *terms* would be made known in future advertisements, "and on the day of sale;" and on the day of sale, they made known by a written announcement read by the auctioneer, that the terms which had been subsequently adver-
37 tised, might be modified by them in favor of the purchasers, if it was for their mutual interests. The arrangement which they made with the purchasers was not a *change* of the terms of sale, but was made in pursuance of, and in exact accordance with, the terms as announced on the day of sale.

It is contended that although the terms of sale were by the express provision of the power entirely within the control of Langley & Co. in the first instance, yet, that having announced certain terms in a public advertisement, and a sale having been

made upon those terms, their power was exhausted, and they could not by a notice given at the sale, enlarge the scope of their 38
powers, and confer upon themselves the right to modify the terms of sale.

But this is assuming the very point at issue—the sale was not on the terms as advertised, but on the written terms announced by the auctioneers at the time of sale and before the bidding—the announcement "that the purchasers will be able to negotiate more favorable terms with the sellers," became one of the terms of sale, additional to, and explanatory of, the terms advertised. The power to fix the terms of sale as to cash or credit, at their option and direction, was expressly given to 39
them, without limitation as to the time within which such option and direction should be declared; and the announcement of their option and direction, made on the day of sale, was consistent with the original advertisement that the "terms would be made known in future advertisements, and on the day of sale."

Even verbal declarations made by the auctioneer publicly at the sale, and before the biddings, are valid and binding, where they are not inconsistent with the terms advertised, but are additional, or explanatory thereto; Cannon v. Mitchell, 2 DeS., 320; Wainwright v. Read, 1 DeS., 573; but in this case the announce- 40
ment was in writing.

And in this case the purchasers were entitled to the benefit of the authorized announcement made by the auctioneer at the sale, in consequence of which they bid, even though the announcement varied the printed terms.

"When a party to whom money was due from the owner of goods sold at auction, agreed with the owner before the auction, that the goods which he might purchase should be set against the debt, and became the purchaser of goods, and was entered as such by the auctioneer; it was held, that he was not 41
bound by the printed conditions of sale which specified that purchasers should pay a part of the price at the time of sale, and the rest on delivery." Bartlett v. Purnell, 4 Adol & El., 792; 31 E. C. L., 180.

Langley & Co. might not, as trustees to sell, impose terms and conditions which were calculated to chill the biddings or make the property bring a less price; and therefore it may

be, that they would not have been at liberty to impose on the day of sale, terms *less* liberal and favorable than those advertised, but they were at liberty to prescribe such terms and conditions as would induce biddings and secure the largest possible price; and while the terms advertised were calculated to deter irresponsible parties from bidding, the announcement as to the negotiations of more favorable terms by approved purchasers was well calculated to invite bids from a greater number of persons, by inducing some to bid, who, although responsible, yet might not be able to comply with the advertised terms as to cash; and therefore the announcement did not tend to chill the biddings.

If the power to determine the terms of sale made Langley & Co. "masters of the estate," it was expressly given to them by the mortgagors, and is essentially different from a power to fix the price—the power to determine at their option and direction the *terms* of sale was expressly given—but the *price* was to be determined by the amount bid at a sale at auction. The discretion given them as to the terms of sale, did not enable them to defeat the objects intended to be obtained by a public sale; and their arrangement having been made in exact accordance with the terms fixed and declared by them on the day of sale, was within that discretion, and was without limit so long as they acted in good faith, and will not be interfered with by the Court except on the ground of fraud.

It is further contended by appellants that "if the agreement made by the mortgagees with the purchasers be regarded as a change in the terms of sale, which was binding upon all parties having an interest in the proceeds of sale, its legal effect was to annul the public sale, and to make a private sale, which Langley & Co. could not do under their power to sell at auction."

I repeat, that the arrangement with the purchasers was not a *change of the terms* of the public sale, but was made in conformity with the terms announced at the sale, and consistent with the original advertisement that the terms would be made known on the day of sale.

What constitutes "a sale at public auction?" "Every mode of sale whereby the seller comes under an engagement to accept the highest offer, and the highest bidder becomes the purchaser."

Where, after an auction at which there was no bidding, the seller's agent stated that he would be ready to treat for the sale by private bargain, and the meeting broke up; and the agent shortly afterwards went into a private room, with several of the 46
persons who attended the sale, and he stated that the highest offer above £50,000 would be accepted; and offers were accordingly made to him, and he having opened them, said that the one which was the highest would be accepted, *provided the terms of payment could be adjusted*, and these terms having been adjusted, the bargain was concluded the following day—this was held to be an auction sale under the Act as to auctioneer's license.

Walker *vs.* Advocate General, 1 Dow, 111, cited; 1 Sugden on Vendors, 11.

Bingham on Sale of Real Property, 578. 47

But even if the arrangement with the purchasers constituted a private sale, it was made because the public sale had failed by reason of the inability of the purchasers to comply, and was an act within the scope of their power as trustees for sale.

"Trustees for sale, after an ineffectual attempt to sell at auction, may sell at private sale; and this where they were expressly directed by Statute to sell by auction."

Mather *vs.* Priestman, 9 Sim., 352; 16 Eng. Ch., 352.

"Where trustees appointed to sell at public sale were unable, after unusual efforts, to obtain a purchaser at the minimum price, 48
it was held that a *bona fide* private sale, though for less than the public offer, was valid."

Hill on Trustees, 480—note, citing Tyson *vs.* Mickle, 2 Gill, 383; Gibbs *vs.* Cunningham, 1 Maryl. Ch., 44; Gibson's case, 1 Bland, 138.

"A power to sell at auction is duly exercised where the property has been advertised, and an offer sent in by letter, which exceeding any bid when the property is put up for sale, is accepted." Tyree *vs.* Williams, 3 Bibb, 367.

But if the arrangement between Langley & Co. and Cogs- 49
well and his associates constituted a private sale, then it should be regarded as a private contract before the auction, to allow Cogswell to purchase for $20,000 over and above the debt to Langley & Co., and the subsequent public sale at auction, to the purchaser at the private sale, was a valid compliance with the

terms of the power, under the authority of the case of Greenleaf *vs.* Queen, 1 Peters, 138, cited by appellants.

In that case, the property conveyed in trust to be sold at public auction, had been sold by private contract, and the
50 property was afterwards offered for sale in the manner prescribed by the deed of trust, for the purpose of making a title to the private purchaser; at which time more was bid for the same than the amount for which it had been privately contracted to be sold; possession was delivered to the purchaser by private contract at the price agreed on; and the sale was held valid. While it was declared that the trustee was bound to conform with the requirement of the trust deed by selling at public auction, it was held that the sale at auction to the purchaser at private contract, made for the purpose of "going through the
51 forms prescribed by the deed," was a sufficient compliance.

Mr. J. Washington in delivering the opinion of the Court, says:

"It is not even charged in the bill, much less is there any proof in the cause to warrant a suspicion, that the sale was not fairly conducted, or that any person bid for the lots set down to Elliott, more than the sum at which they were charged to him."

2. But the arrangement, if not in pursuance of the express power given to Langley & Co., was within the scope of their discretionary power, and, being for the interest of all concerned,
52 was valid and binding.

(*a.*) It procured the bid for the property over and above the mortgage debt. It is beyond question that it was only upon the expectation of obtaining the promised indulgence that Cogswell and his associates, as they aver, were induced to make the bid they did; and that they did not doubt that Langley & Co. had authority, as well as the willingness, to give the indulgence. It is equally clear from all the circumstances, that
53 no person other than those standing in their relation to the property would have engaged to bid so large an amount as $214,000; and if the property had been sold for no more than the mortgage debt, $194,000, no other creditors would have received anything.

(*b.*) The arrangement was necessary to secure this advantageous sale. One-third of their bid would have been $71,445.69,

which it was impossible for the purchasers to pay in cash, because they had exhausted their resources in the ineffectual attempt to complete the mill; and if they could have raised and paid that amount to Langley & Co., they would not have sold the property. The entire property of the purchasers, outside of what had been invested in this enterprise, was real 54
estate not immediately available, although believed to be of sufficient value to constitute ample security for the indulgence which they claimed, and the expectation of receiving which had alone induced them to bid.

(*c.*) The arrangement was for valuable and adequate consideration, and (*d*) was intended by Langley & Co. to protect and benefit the creditors of the Kalmia Mills subsequent to themselves, because it procured the bid in excess of the mortgage debt, without which they would have received nothing; and it procured the mortgages of the individual property of the pur- 55
chasers, which was not liable to the creditors of the Kalmia Mills, to secure the entire amount bid.

(*e.*) The arrangement, therefore, would have been sanctioned by the Court, if application had been then made to confirm it.

As a test of the conduct of Langley & Co., let us consider the sale of 1867 as if it had been made under the same circumstances as was the sale of 1868; that is, after proceedings instituted in the Court to enjoin the sale, but under the power, and under an order of Court, subjecting the proceeds to its order. The property being knocked down to Cogswell and his 56
associates, and they being unable to comply with the terms as advertised, by paying one-third of their bid in cash, claim the more favorable terms promised at the sale, and the expectation of receiving which had alone induced them to bid, and offer to Langley & Co. to give the additional security which they afterwards gave, in consideration of the indulgence. The alternative would have been the acceptance of the offer, or a resale.

If Langley & Co., as trustees, having made the sale, had *then* made application to the Court, stating the facts, and showing that the bid made by Cogswell and his associates was not 57
only the sole offer for the property which could be obtained, but, from the circumstances, was manifestly more than any one else could afford to bid for it; that there was no reason for be-

lieving that the property was not worth much more than all the claims against it; that the property proposed to be mortgaged as additional security for the unsecured creditors of the Kalmia Mills, as well as themselves, was estimated to be worth $100,000; and that in their opinion it was manifestly for the interest of all parties that the sale should be confirmed upon the proposed
58 conditions; and asking the leave of the Court to carry the arrangement into effect; the alternative presented to the Court would have been the same as was presented to Langley & Co., an acceptance of the offer, or a re-sale.

Can there be any reasonable doubt that the Court would have confirmed the arrangement? And if the Court would have sanctioned the act of the trustees then, it will do so now; and will not, upon the ground of their having exceeded their technical power, in an arrangement entered into in good faith, and with the conviction on their parts, shared, as they believed, by
59 the creditors, that it was for the interest of all parties, make them bear the entire loss which has ensued, caused by the extraordinary and unexpected depreciation in the value of property which has taken place since; or if they were mistaken in the value of the additional security, it was an error of judgment, for which they will not be held liable, because they took for themselves what they took for others. "Under particular circumstances, a trustee is held capable of exercising the discretionary powers of the *bona fide* proprietor, for the trust estate itself might otherwise be injuriously affected. The necessity of the moment may demand an
60 immediate decision, while the sanction of the parties who are beneficially interested cannot be procured without great inconvenience, or where the *cestui que trusts* are a numerous class, or cannot be obtained at all.

The alternative of instituting a suit for the mere purpose of consulting the Court, would always be attended with considerable expense, and it may be an expense wholly disproportioned to the importance of the occasion, and perhaps, in the mean time, the opportunity might be lost. It is, therefore, evidently in furtherance of the *cestui que trusts'* own interests, that when the
61 circumstances of the case require it, the trustee be at liberty to exercise a reasonable discretionary power. It is a general rule of equity, that what is compellable by *suit, or would have been*

ordered by the Court, is equally valid, if done by the trustee without suit, that is, *without the sanction of the Court.*" Lewin on Trusts, 513.

Can there be any reasonable doubt that the consent of Markey & Co., who had just procured the guarantee of their contract, and a promise of renewal from the purchasers, if sought in the preceding, would have been given; or would have been assumed by the Court, if they were not represented, because the 62
arrangement was manifestly for their interest ?

And even if the trustee obtains the sanction of the Court without making his *cestui que trust* party to the proceeding, although orders obtained upon such *ex-parte* proceedings do not bind the *cestui que trust* as an estoppel, nevertheless the facts which accompanied the acts of the trustee so confirmed, will not be overlooked in a subsequent proceeding to which the *cestui que trust* is a party; and the Court will sanction when the parties are represented, whatever would have been authorized under the circumstances then existing. 63

Sollee *vs.* Croft, 7 Rich., Eq. 45.

What would have been the responsibility of Langley & Co., if, after their announcement that they would give more favorable terms than the requirement of the payment of one-third cash, they had refused to give the indulgence claimed by the purchaser, upon the offer of security then adequate, and resold the property and it had not brought more than their mortgage debt?

3. The arrangement was sanctioned or acquiesced in by all the creditors of the Kalmia Mills, especially by Markey & Co. 64
This position the Decree holds is supported by the facts reported (Statement, fol. 49.)

The Referee reports, that the proposal of Cogswell and his associates to purchase at a price exceeding the mortgage debt, and to give a note for $20,000 to cover the debts of the general creditors of the Kalmia Mills, " was made known to all the creditors, and they either acquiesced in, or expressed no dissent therefrom. Each creditor, therefore, had an interest in the note and the leading creditors had notice of and acquiesced in it." When Cogswell and his associates determined to purchase 65
the property at a price sufficient to pay all the debts of the

Company, it was with the express purpose of completing the factory and carrying on the enterprise; and as this would involve the immediate expenditure of a large amount of money, it necessarily implied that they must receive indulgence in payment of the cash portion of the purchase money, and, therefore, when their intention was communicated to the creditors, and was, as reported by the Referee, either acquiesced in or not dissented from, it involved an acquiescence in this arrangement
66 for indulgence which was a necessary means for carrying their intention into effect.

The Referee cites as authority for this position the case of Tennant v. Stoney, 1 Rich. Eq., 222. In that case it was decided, that a creditor's election may be presumed from his acting in conformity with one or other of the alternatives offered. A substantial is substituted for a formal election. Thus, if one of the preferred creditors, knowing that he had been protected by the mortgage, had forborne to sue or demand payment of his debt until the time limited for the payment, he will be presumed
67 to have accepted, although he had not signed and sealed the mortgage.

The same rule, I submit, will apply to the presumed election of the creditors in relation to the arrangement granting indulgence in payment of the cash portion of the purchase money, as in relation to the note given for their debts.

That note was only given because of this indulgence, and the creditors cannot accept one without confirming the other. And having forborne to sue or demand payment until the time limited for payment, will be presumed to have accepted the condi-
68 tions upon which the arrangement was made. Markey & Co. especially were benefitted by the arrangement, because it induced and enabled Cogswell and his associates to purchase, and to fulfil their covenant to continue their contract with Markey & Co., under which they made them considerable payments. They were *cestui que trusts* under the conveyance to Cogswell, in trust, dated 10th May, and recorded, and are, therefore, affected with notice of its provisions, and their acceptance of its terms will be presumed, according to the principles of the case of Tennant vs. Stoney.

69 Markey & Co. admit in their answer, (Statement, fol. 80,) that

on the 11th June, 1867, they entered into another agreement with Cogswell, trustee, by which the allowance for work already done, as well as for what was to be done, was made, and they continued to work under this agreement as long as the means of the other contracting parties enable them to carry on the work.

They knew of the intention of Cogswell and his associates to bid for the property more than the debt to Langley & Co., and they sought and obtained from them the covenant to guarantee their contract if they did purchase. They had been intimately associated with the enterprise from its commence- 70
ment; knew the relations of Langley & Co. to the property, by reason of their loans, out of which they had received payments on their contract, and that the property was sold because Cogswell and his associates could not raise the money to repay Langley & Co., they must, therefore, necessarily have known that Cogswell and his associates could not have paid to Langley & Co., $71,445,69 in cash, after the sale; but that they must have obtained indulgence from them in consideration of additional security.

If they had not express notice of these facts, they had im- 71
plied notice, for they knew enough to have put them on inquiry, and such inquires would have led to the knowledge of the fact that Langley & Co. had, by their indulgence, procured a purchaser at a price sufficient to pay them, and had exacted from the purchasers the mortgage of their individual property to secure their payment after themselves.

Whatever is sufficient to put a person on inquiry in relation to prior equities, is considered in equity as equivalent to notice of such equities. * * * * It is not necessary that he have actual notice, nor detailed information to charge him, if he 72
has such information as gives notice of the *substance* of a transaction, or as *leads* to actual knowledge or detailed information, it is sufficient. Adam's Equity, 151, note 1.

But the answer of Evans (Statement, fol. 86,) positively affirms that at the time of making the new contract, 11th June, 1867, Markey & Co. had full, exact, and express notice of the condition of the title to the property, and that it was held by Cogswell in trust to pay the notes given to Langley & Co. before the note to the Kalmia Mills, and that they acquiesced.

73 As we have seen, the decree sustains this position as supported by the facts.

The appellants contend that Langley & Co. themselves regarded the transaction at the time as a loan of their own funds, and intended to bind themselves and no one else, by their act; and that this is manifested, first, by the agreement, the bond of indemnity, and mortgage, being personal to themselves, and not as agents of the mortgagors, and were, therefore, intended to protect themselves and none other.

The agreement and bond of indemnity both recite the sale
74 under the powers in the mortgages of the Kalmia Mills; the bid of $20,000 over and above the mortgage debt, and that the note for that amount was to be assigned to the Kalmia Mills, and that Langley & Co., as attorneys of the Kalmia Mills will convey to Cogswell, in trust to pay all the notes given for the purchase money, as well the $20,000 note as those given for their debt, provided the additional property specified is mortgaged to secure the payment of all the notes. And the bond of indemnity, and the mortgages of the individual property, as well as the conveyance to Cogswell in trust, all provide for and
75 secure the payment of *all* the notes, and do not provide for and protect Langley & Co. alone, as assumed.

Second. The appellants rely upon the statements made by Langley & Co. in their Bill, as to their purpose and intent in the arrangement.

It is sufficient answer to this, that these statements of the Bill are only the recital of the agreement, and were made before Langley & Co. knew that Markey & Co. denied their right to priority of payment at all, and certainly before they had any intimation that it would be claimed that their arrangement with
76 the purchasers had waived their priority. The Bill was filed to prevent Markey & Co. from interfering with the sale which Langley & Co. were about to make under their power; and the only pretext which the Bill states, is the claim of Markey & Co. under their mechanic's lien. The question of the effect of the agreement on the priority of Langley & Co., was first suggested in the answer, and cross-bill, of Markey & Co.

Third. The appellants consider the fact that the bond of indemnity is to secure future loans, as conclusive that Langley &

Co. considered the arrangement as made solely for their own benefit. 77

This is not a necessary inference; these instruments, by what I consider their fair construction, provided for the payment, first, of the notes which represented their mortgage debt; next, for the payment of the note for $20,000 to the creditors other than themselves; and afterwards for the payment of any further loans which they might make, to enable the purchasers to complete the enterprise, and thereby secure the means of paying all their debts; and the action of Langley & Co. was perfectly consistent with the position they occupied; was in good faith; and does not defeat their right to priority of payment. 78

The arrangement made by Langley & Co. was then, I submit, not a change of the terms of sale, nor the substitution of a private for a public sale, nor one entered into solely for their own benefit; but in making it they acted as agents of the mortgagors, in pursuance of their power, and for the benefit of all interested; and the loss that has ensued must fall upon the creditors of their principal, subsequent to themselves, and not upon them.

II.

The next question to be considered, is: Did Langley & Co. 79 by their conveyance of 10th May, 1867, to Cogswell in trust, waive their right to priority of payment; so that in the distribution of the proceeds of sale of 1868, made under that deed, the note for $20,000 dedicated to the payment of the other creditors of the Kalmia Mills, is to be paid *pari passu* with the notes representing the debt to Langley & Co?

The Circuit decree holds that "the agreement between Langley & Co. and the purchasers, the bond of indemnity, and the mortgages of individual property securing it, and the trust deed to Cogswell, are parts of one arrangement, which effectually se- 80 cures the payment of Langley & Co., the creditors having the paramount lien, in preference to every other creditor." (Statement, fol. 52.)

The intention of the parties to the deed is to be gathered from the same facts and circumstances as have been already dwelt upon in relation to the indulgence in payment of the cash

portion of the purchase money; and as these, in my view, clearly show that no act was done by Langley & Co. by which they intentionally or knowingly consented to waive, or post-
81 pone, their well assured right to priority of payment of their entire debt, or that they had any inducement to do so, if this deed is to have the effect of postponing such priority; it must be by necessary operation of law, in direct contravention of their intention as well as of their right.

The Referee held that the note for $20,000 does not take rank *pari passu* with the other notes secured by the trust deed, and gives fully the facts and principles upon which his conclusion is based, (Transcript of Record, fol. 133–142,) and the Court concurred in the judgment of the Referee, (Statement, fol. 50.)

82 The sale made by Langley & Co. in 1867, under their power, was a foreclosure of the mortgages, and must be considered as if made by a Master in Equity under a decree for foreclosure. Its effect was to substitute the securities taken for the purchase money in place of the land, and left the rights, equities, liens, and priorities, of all parties in such securities, the same as in the land.

"If the sale had been made by a Master in Equity, and the notes for the purchase money had been left in his hands, it would have been his duty to apply the proceeds as fast as col-
83 lected towards the payment first of the debt of Langley & Co., and after this was paid to the other creditors."

(Referee's Report, Transcript of Record, fol. 139.)

The trust deed was made by Langley & Co., as attorneys, irrevocable of the Kalmia Mills, to convey, "and to do all other acts necessary to secure the covenants of the mortgages," that is, the payment of Langley & Co.; and was intended only to carry the sale into effect. The deed conveyed the mortgaged premises in trust to pay the purchase money, and no beneficial interest vested in the grantee until the purchase money was paid.
84 Langley & Co. reserved to *themselves* the power to sell upon default of payment of any one of the notes, and as all the notes representing their debt were payable before the note for $20,000, and as they were to receive the purchase money, and apply it as collected to the liquidation of their debt, these provisions of the deed sufficiently recognized, and practically secured, their right to be first paid in full from the proceeds of sale.

After the failure to pay their notes, and before the $20,000 note, which had been transferred to others, was payable, the sale of 1868 was made by Langley & Co., and was under the power reserved to them in this deed, and may be considered as 85
in effect a *re-sale at the risk of the purchasers at the first sale*, who had failed to comply; and the proceeds of such second sale must, therefore, be distributed in the same manner, and in the same order of priority as the proceeds of the first sale. The effect of the arrangement with the purchasers at the first sale, and the trust deed, which constituted part of it, has been only to postpone the distribution of the proceeds of sale of the mortgaged property, but not to disturb the rights and priorities of the parties entitled thereto. Although the distribution is made by a Court of Equity, the proceeds of sale of the mortgaged pro- 86
perty are "*legal* assets, which are administered in Equity in the same manner as at law, and in such administration Courts of Equity recognize and enforce all antecedent liens, according to their rank and priority."

Tennant *vs.* Stoney, 1 Rich. Eq., 222.

The argument of the Appellants, while admitting that Langley & Co., as holders of the paramount lien, were entitled to retain in their own hands the whole security taken, and apply the proceeds as collected to the liquidation of their claims; and that had they done this they would have had the fund in the 87
same position as a fund in court, to be applied as realized to the liens according to their original priority, contend that by their conduct Langley & Co. assented to such a distribution as placed the other creditors upon the same footing as themselves.

The act of Langley & Co., upon which appellants rely as destroying that right to priority, is their having "entered into a solemn and formal agreement to accept the notes of the purchasers retained by them, to the amount of their claim, in payment of the debt due to them by the Kalmia Mills."

The word "accept" was clearly not used in the sense put 88
upon it by the appellants, but only as the equivalent of "take," for while in the agreement of 10th May, 1867, the expression is used, that Langley & Co. agree to "accept in payment of the debt due to them this day by the Kalmia Mills under the mortgages, the following notes," the "note for an amount over and

above their debt, which is to be assigned to the Kalmia Mills," is also enumerated; and in the Bond of Indemnity, it is recited, that whereas, the purchasers not being able to comply with the advertised terms of sale, " Langley & Co. agreed to *accept* from
89 the said purchasers their promissory notes for the entire amount of the debt due to them by the Kalmia Mills, *and the entire amount of the purchase money bid by the said Cogswell,*" without requiring from the said purchasers any payment in cash beyond the expenses of sale, upon their giving additional security.

The receiving of a note or bill for a debt is not payment, unless it be expressly accepted as such, or produces payment. Barelli v. Brown and Moses, 1 McC., 449; Boulware v. Harrison, 4 Rich. Eq., 317; Costello v. Carr, 2 Hill, 528; Bank v. Bobo, 9 Rich., 31; Hext v. Fraser, 2 Strob. Eq., 250.

90 The Referee says: (Transcript of Record, fol. 141,) " In the present case Langley & Co., their Solicitor, Evans, Mordecai and Cogswell, all state that they did not accept these notes as payment." The appellants say that this is a mistake; for that Langley and Mordecai did not testify, and there is nothing on this point in the testimony of Evans and Cogswell. It is clear that the Referee refers to the statements of these parties as contained in the pleadings. Langley & Co. by the statements of their bill, certainly in effect, if not in terms, deny the acceptance of the notes in payment, and Cogswell, Evans and Mor-
91 decai, in their answers all admit the accuracy of the statements of the bill, as within their own knowledge, and declare that they believed that in all they did they were securing Langley & Co's priority. (Answer of Cogswell, Transcript of Record, fol. 35.) The Referee continues: " The deed given by Langley & Co. to Cogswell is evidence to the same effect. It expressly declares that the conveyance to him of the property purchased by these notes was on condition that the notes be paid. In other words, the purchase money should not be considered as paid until the notes were paid, and out of this purchase money only could the
92 lien be satisfied. At the most, the delivery of the note for $20,000 to the President of the Kalmia Mills, by Langley & Co., raises the presumption that they were satisfied with the notes and were willing to distribute the fund. But this presumption is rebutted by all the circumstances of the case, and by

the positive evidence of the intention of the parties who made and who accepted the delivery."

The question whether Langley & Co. accepted the notes as payment is one of fact, upon which the Referee decided that they did not, and his decision is confirmed by the Circuit Decree. 93

I have already given the reasons which, in my judgment, show that the trust deed by a just construction of the power reserved to themselves by Langley & Co., sufficiently protected their priority, by the control which was secured to them; and these considerations, together with the proved intention of the parties, must control in the construction of the deed.

Langley & Co., in their answer to the cross-bill of Markey & Co., in which, for the first time, it was suggested that their priority was not preserved by the conveyance to Cogswell in trust, say: 94

"But the agreement which these defendants entered into with Cogswell, Evans and Mordecai, after the said sale was made in pursuance of what they were advised was within their power and discretion, and they never conceived that said agreement could be construed as a waiver, or postponement of their distinct prior lien upon all the property of the Kalmia Mills sold under said mortgages, and their first lien upon the individual property of the said purchasers, mortgaged to them as collateral and additional security for their debt; that, on the contrary, they believed and were advised that the said agree- 95
ment, the conveyance to Harvey Cogswell in trust, on the 10th May, 1867, and the bond of indemnity and mortgages executed by the purchasers, all distinctly expressed and enforced in a legal manner this their distinct prior right and lien; and these defendants say, that if these said several instruments are in any degree or manner defective and deficient in the full, exact, and legal expression of this their right, and, according to their strict and technical import, do not protect and effect the same, that then the same were executed and consented to by these defend-
ants in ignorance and mistake of fact, and they pray to be 96
relieved by this Honorable Court, as a Court of Equity having power so to do, from the strict legal effect of said instruments, so far as the same is contrary to their true and equitable meaning

above their debt, which is to be assigned to the Kalmia Mills," is also enumerated; and in the Bond of Indemnity, it is recited, that whereas, the purchasers not being able to comply with the advertised terms of sale, " Langley & Co. agreed to *accept* from
89 the said purchasers their promissory notes for the entire amount of the debt due to them by the Kalmia Mills, *and the entire amount of the purchase money bid by the said Cogswell,*" without requiring from the said purchasers any payment in cash beyond the expenses of sale, upon their giving additional security.

The receiving of a note or bill for a debt is not payment, unless it be expressly accepted as such, or produces payment. Barelli v. Brown and Moses, 1 McC., 449; Boulware v. Harrison, 4 Rich. Eq., 317; Costello v. Carr, 2 Hill, 528; Bank v. Bobo, 9 Rich., 31; Hext v. Fraser, 2 Strob. Eq., 250.

90 The Referee says: (Transcript of Record, fol. 141,) " In the present case Langley & Co., their Solicitor, Evans, Mordecai and Cogswell, all state that they did not accept these notes as payment." The appellants say that this is a mistake; for that Langley and Mordecai did not testify, and there is nothing on this point in the testimony of Evans and Cogswell. It is clear that the Referee refers to the statements of these parties as contained in the pleadings. Langley & Co. by the statements of their bill, certainly in effect, if not in terms, deny the acceptance of the notes in payment, and Cogswell, Evans and Mor-
91 decai, in their answers all admit the accuracy of the statements of the bill, as within their own knowledge, and declare that they believed that in all they did they were securing Langley & Co's priority. (Answer of Cogswell, Transcript of Record, fol. 35.) The Referee continues: " The deed given by Langley & Co. to Cogswell is evidence to the same effect. It expressly declares that the conveyance to him of the property purchased by these notes was on condition that the notes be paid. In other words, the purchase money should not be considered as paid until the notes were paid, and out of this purchase money only could the
92 lien be satisfied. At the most, the delivery of the note for $20,000 to the President of the Kalmia Mills, by Langley & Co., raises the presumption that they were satisfied with the notes and were willing to distribute the fund. But this presumption is rebutted by all the circumstances of the case, and by

the positive evidence of the intention of the parties who made and who accepted the delivery."

The question whether Langley & Co. accepted the notes as payment is one of fact, upon which the Referee decided that they did not, and his decision is confirmed by the Circuit Decree. 93

I have already given the reasons which, in my judgment, show that the trust deed by a just construction of the power reserved to themse'ves by Langley & Co., sufficiently protected their priority, by the control which was secured to them; and these considerations, together with the proved intention of the parties, must control in the construction of the deed.

Langley & Co., in their answer to the cross-bill of Markey & Co., in which, for the first time, it was suggested that their priority was not preserved by the conveyance to Cogswell in trust, say: 94

"But the agreement which these defendants entered into with Cogswell, Evans and Mordecai, after the said sale was made in pursuance of what they were advised was within their power and discretion, and they never conceived that said agreement could be construed as a waiver, or postponement of their distinct prior lien upon all the property of the Kalmia Mills sold under said mortgages, and their first lien upon the individual property of the said purchasers, mortgaged to them as collateral and additional security for their debt; that, on the contrary, they believed and were advised that the said agree- 95
ment, the conveyance to Harvey Cogswell in trust, on the 10th May, 1867, and the bond of indemnity and mortgages executed by the purchasers, all distinctly expressed and enforced in a legal manner this their distinct prior right and lien; and these defendants say, that if these said several instruments are in any degree or manner defective and deficient in the full, exact, and legal expression of this their right, and, according to their strict and technical import, do not protect and effect the same, that then the same were executed and consented to by these defend-
ants in ignorance and mistake of fact, and they pray to be 96
relieved by this Honorable Court, as a Court of Equity having power so to do, from the strict legal effect of said instruments, so far as the same is contrary to their true and equitable meaning

and intent, to wit, to secure to these defendants the continuance of their acknowledged priority over all other creditors of the Kalmia Mills, and of the purchasers of the property."

(Transcript of Record, fol. 84.)

Harvey Cogswell, the grantee of said deed, in his answer to the original bill, says, he "admits to be true all the statements
97 of the bill in relation to the sale of 23d April, of his purchase at said sale, of the agreement between Langley & Co. and himself and his associates in the purchase of the property, the conveyance to him in trust, the bond of indemnity and mortgages, and that he believed at the time of entering into said agreement, and executing said several instruments, that he was securing to the said Langley & Co. the first lien upon all the said property, and that the claims of all other creditors of the Kalmia Mills, and of the purchasers of said property were subsequent to and subject to the said prior right and lien of Langley & Co."
98 (Transcript of Record, fol. 35.) The answers of Evans, Mordecai, and the Kalmia Mills, all admit the statements of the bill, and the priority of Langley & Co. over all other creditors. (Transcript of Record, fol. 50, 56, 57.)

The Referee reports that "Mr. Miles, who was the solicitor both of Langley & Co. and Cogswell, says that he was instructed to draw the deed so as to secure the priority of Langley & Co.; that they never had any intention of surrendering the priority, and that Cogswell, Evans and Mordecai fully recognized and admitted their right. After careful examination I
99 can discover no consideration or inducement leading Langley & Co. to any such surrender. If then the deed, by a technical construction of its words, surrenders their priority, it was drawn and executed in mistake, and, following the authority of Story, should be reformed in this respect. (Transcript of Record, fol 139.)

In this view the Circuit Court concurs.

"One of the most common classes of cases in which relief is sought in equity on account of a mistake of facts, is that of agreements, either executory or executed. Sometimes by mis-
100 take, the written agreement contains less than the parties intended, sometimes it contains more; and sometimes it simply varies from their intent by expressing something different in sub-

stance from the truth of the intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties, * * * Equity interposes in cases of written agreements where there has been an innocent omission or insertion of a material stipulation contrary to the intention of both parties and under a mutual mistake. * * If the mistake should be admitted by the other side, the Court 101
would certainly not overturn any rule of equity by varying the deed." Story's Eq., § 152, 155, 156.

"If parties enter into an agreement, but there is an error in the reduction of the agreement into writing, so that the written agreement fails through some mistake of the draftsman, either in matter of law, or of fact, to represent the real agreement of the parties, or contains terms or stipulations contrary to the common intention of the parties, a Court of Equity will correct and reform the instrument so as to make it conformable to the real intent of the parties. So also, if a conveyance, executed 102
for the purpose of giving effect to and executing an agreement, should by mistake give the purchasers less than the agreement entitled him to, he may call on the Court to rectify the defective conveyance, and give him all that the agreement comprehended.

Kerr on Fraud and Mistake, 418, and cases cited.

In Joynes v. Statham, 3 Atk., 388, Lord Hardwicke held that an omission in an agreement by mistake, stands on the same ground as an omission by fraud, and allowed an omission to provide for payment of taxes by the lessee, to be supplied by 103
the evidence of the attorney who drew the lease.

In Ramsbottom v. Gosden, 1 Ves. and Bea, 165, the attorney who prepared the agreement conceived that the words were sufficient to express the intent of the parties; the Court thought them not sufficient, and held that the omission arose from the mistake of the attorney, contrary to the intention of the parties, and that the evidence of the attorney was admissible to prove this.

In Hunt v. Rousmanier, 1 Peters, 13, it was held to be an "incontrovertible general principle, that where an instrument 104
is drawn and executed, which professes, or is intended, to carry

into execution, an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. * * * That the general intention of the parties was to provide a security, as effectual as a mortgage of the vessels would be, can admit of no doubt; and if
105 such had been their agreement, the insufficiency of the instrument to effect the object, which was afterwards prepared, would have furnished a ground for the interposition of a Court of Equity which the representative of Rousmanier could not easily have resisted."

In South Carolina it is held not only that a mistake of fact, but a *mistake* of law, as distinguished from *ignorance* of law, is a ground of relief. Lowndes v. Chisolm, 2 McC. Ch., 455; Lawrence v. Beaubien, 2 Bail, 623.

In the case of Bailey v. R. R. Co., 17 Wallace, 96, cited by ap-
106 pellants, it was insisted by the complainant, that evidence that all the parties understood the transaction from its commencement to its final consummation, as it was understood by the respondents, was inadmissible, and the Court "inclined to concur with the complainant in that proposition," but held that such evidence was admissible for the purpose of connecting the several written instruments together, and showing that they were all parts of one transaction, but that such evidence was in that case unnecessary, as the instruments themselves contain the most persuasive evidence to establish that fact; and that they must all be
107 regarded as instruments *in pari materia*, and as such, proper subjects of consideration, in order to ascertain or determine what is the true nature of the transaction, and the true construction of the contract between the parties; all the writings were executed as means to the same end. * * * Standing alone, it may be admitted that the indenture furnished some support to the views of the complainant, but it is clear that all ambiguity disappears when it is read in connection with the writings which preceded and followed it in respect to the same subject matter."

In this case, Langley & Co. filed a bill to prevent Markey &
108 Co. from interfering with the sale about to be made by them

under their power, for the payment of their debt. Markey & Co. filed a cross-bill denying the priority of Langley & Co., on several grounds, among others, because the trust deed under which they were about to sell, waived their priority; Langley & Co. in their answer to the cross-bill, deny that by a just construction of the trust deed their priority is waived; and add that if the deed is capable of that construction, it is because of the mistake of omitting words which would have fixed their priority beyond doubt, and which it was the intention of the parties to the deed to secure, and pray the Court to enforce their right by 109
correcting the mistake, if any, in the deed. The grantee of the deed admitted the intention to secure the priority, and the draftsman proved the instructions, and, as in Ramsbottom v. Gosden, that he considered the words used as sufficient to effectuate the intent. The relief of correcting the mistake in the deed, was only prayed in the alternative, in the event of the Courts giving to the deed the construction for the first time, claimed for it in the cross-bill, and is certainly consistent with the case made by the pleadings.

If Langley & Co. had the right, as held by the Circuit Decree, 110
to make the arrangement which they did with the purchasers of the mill property, and did not thereby waive their priority; and if the conveyance to Cogswell in trust, to pay the purchase money, was part of the same arrangement, intended to secure, and actually securing, the creditors entitled to the purchase money, without disturbing their respective priorities; then they clearly were authorized to preserve their right to be first paid out of the additional security which they required, any balance which should remain after applying the proceeds of sale of the mill property, before any other creditor; and the bond of indemnity, 111
and the mortgages of individual property securing it, all reserved to Langley & Co. the power to sell the mortgaged property, to pay themselves out of the proceeds, and only to account for the surplus, and thereby practically and effectually secured their priority.

I have endeavored to vindicate the acts of Langley & Co. as within the scope of their power, authority, and duty, and to show that they are not liable to such legal consequences as are sought to be visited upon them; and I think it but justice to add,

that, measured by a moral as well as legal standard, their conduct throughout does not show them to have been stern creditors, or that they sought the enforcement of their rights with a selfish disregard of the interests of others.

When the sale of 1867 was made by Langley & Co., they had, in addition to their first mortgage on the mill property, the security of the endorsement of Evans, Cogswell and Mordecai. It would have been easy for Langley & Co., while strictly complying with the conditions of their power, to have so made the sale as to secure to themselves the entire mill property for less than their mortgage debt, and less than its value; in which event the other creditors of the Kalmia Mills would have been without any means or hope of recovering their debts. The only hope of these creditors was in Cogswell and his associates buying at a price sufficient to pay them, and completing the enterprise, and their doing this was dependent upon the consent of Langley & Co. Had they withheld their consent, and refused all indulgence, and allowed the property to be sold for what it would bring, it is impossible to doubt that the other creditors would have lost everything. But Langley & Co. consented that Cogswell and his associates should buy the property for more than their mortgage debt, and secure the payment of this additional amount upon the mortgage property, provided additional security was given, and their rights and priorities should remain unimpaired.

The course pursued by Langley & Co before and after the sale, manifested a sincere desire on their part, not only to allow those who had inaugurated the enterprise an opportunity to complete it, and to redeem the losses they had already sustained thereby, but also to protect the interests of the other creditors, by providing a fund with additional security for its payment, out of which there was every reasonable expectation of their being paid in full. The failure of these hopes has caused great loss to many innocent creditors, and those who inaugurated the enterprise, have proved their honesty and sincerity of purpose by sinking their own fortunes in their efforts to preserve its credit, but it is not justly attributable to Langley & Co., who furnished so large a portion of the money expended on the work, and who have been by far the greatest sufferers. It would be hard indeed, if in addition to the disappointments and losses they

have already sustained, their intended kindness and indulgence, should, by the application of technical rules, be converted into 116
a breach of trust and fraud upon the rights of the creditors subsequent to themselves, to be visited with the penalty of making good their losses.

III.

If the Circuit decree is sustained on the foregoing grounds, it will be unnecessary to consider or decide the questions raised as to the distribution of the proceeds of the note for $20,000; for after applying to the payment of Langley & Co. the net proceeds of sale of the entire property, there still remains due to them a balance of $6,152.13. (Statement, fol. 61.) 117

But if the Circuit decree is reversed, and the $20,000 note is held to be entitled to be first paid out of the purchase money, then, it is submitted, upon such note must be credited the expenses of sale paid by Langley & Co., and expressly made the first charge under the trust deed, $1,399.83; and the amount paid by Cogswell, Trustee, $9,630.69, for which he could set up his claim upon the proceeds of the $20,000 note, together $11,030.52; which would reduce the amount of principal due on this note to $8,969.48. (Transcript of Record, fol. 137, note, fol. 155.) 118

If the note for $20,000 is held to be entitled to be paid *pari passu* with the notes of Langley & Co., then the amount to be applied to said note will be only such proportion of the entire purchase money at the second sale ($160,000,) as the $20,000 note bore to the entire purchase money at the first sale, ($214,337.07,) which is $14,929; (214,337 : 20,000 : : 160,000 : 14,929.)

And upon this note, so apportioned, must, it is submitted, be credited the expenses of sales, $1,399.83, and the amount paid by Cogswell, Trustee, $9,630.69, which will reduce the balance 119
of principal due on said note to $3,898.48. (Transcript of Record, fols. 128, 155, 185.)

The payments made by Cogswell, Trustee, were of debts of the Kalmia Mills, for which the $20,000 note was given. The debts paid were such as the purchasers were compelled to pay to

retain possession of the property, and carry on the work, the completion of which was to afford the true and adequate security for all their liabilities, and each payment enhanced the security of the creditors. "The debtor has certainly the right
120 to appropriate payments made by him to that debt, which he, the debtor, has most interest to discharge; and if the debtor makes no appropriation, the creditor may," Story's Eq., § 459, note C; Schnell *vs.* Schroder, Bail. Eq., 334, 437; Stewart *vs.* Cochran, Ib. 380; Wilborn *vs.* Bissell, Ib. 436; Jones *vs.* Kilgore, 2 Rich., Eq. 63.

Cogswell, Evans, and Mordecai, were not only the debtors on this note, but they were themselves creditors of the Kalmia Mills, as endorsers of the notes of the Company, and guarantors of its debts. But, whether the appropriation was
121 made by the debtor or creditor, or by Cogswell, Trustee, or by the Kalmia Mills, or by Cogswell, Evans, and Mordecai, the purchasers, the payments so made can be referred to nothing else than this note which embraced all the debts. And as these debts included in the $20,000 were certainly paid out of money which Langley & Co., as the creditors having the paramount lien, would have had the right to insist should be applied to the reduction of their debt, they are clearly entitled by the well recognized principles of equity, to be subrogated to the rights of the creditors of the Kalmia Mills thus paid, and to
122 receive the dividend out of any amount which may be appropriated to the $20,000 note, to which such creditors would be entitled, if they had not been so paid. Pell *vs.* Ball, Speer's Eq., 524; Pinckney *vs.* Pinckney, 2 Rich. Eq., 236.

Or if, as suggested by the Referee, (Transcript of Record, fol. 157) the creditors of Cogswell, Trustee, are entitled to set up these payments as entitled to a dividend on the $20,000 note, and might claim to be subrogated to them; or, if in paying these debts, Cogswell, Trustee, became the purchaser of the claims of the creditors of the Kalmia Mills, and has the right
123 to stand in their shoes, and to claim the dividend from this note to which they would have been entitled; in any aspect, Langley & Co. being creditors of Cogswell, Trustee, by virtue of a prior and paramount lien, these payments must be held to have made to increase the security of Langley & Co., and there-

fore Langley & Co. must now receive the benefit of them in preference to any other creditor.

In conclusion, I submit the following propositions, as sustained by the law and facts of the case:

1st. That Langley & Co., by virtue of the mortgages of 1866, had the lien upon the property of the Kalmia Mills, first in 124
time, first in rank and degree, and most comprehensive.

2d. That the sale of 23d April, 1867, under the powers in the mortgages, did not vary the rights and priorities of the parties, but only substituted the proceeds of sale, as well credit as cash, in place of the land.

3d. That nothing was done by Langley & Co., after the sale, by which they waived their priority, but their action being an exercise of their power, and within the scope of their duty, preserved their rights; would have been then sanctioned by the Court, and will now be sustained. 125

4th. That the trust deed to Cogswell being intended to continue in respect to the proceeds of sale, the relations which the several parties bore to the mortgaged property, did not vary the priorities.

5th. That the sale of 19th March, 1868, made under the power reserved in this deed, did not vary the rights; and the proceeds of this second sale must be applied as would have been the proceeds of the first, to the extinguishment of the liens upon the mortgaged property, according to their legal priority.

6th. That if the note for $20,000 is held to be entitled to be 126
paid *pari passu* with the notes held by Langley & Co., then it is entitled to receive only its proportion of the purchase money, and that Langley & Co. are entitled to receive the benefit of the payments made by Cogswell, Trustee, to the creditors, whose debts were embraced in said note.

CH. RICHARDSON MILES,
ATTORNEY FOR LANGLEY & CO.,
Appellees.